Supreme Court, U.S.
FILED

03 627 OCT 24 2003

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No. ____

IN THE

Supreme Court of the United States

ROBERT B. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 24, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

218 pp

QUESTIONS PRESENTED

The Lacey Act prohibits the importation of any fish or wildlife in violation of "any law or regulation of any State or in violation of any foreign law." Petitioners, seafood importers and dealers, were convicted of various charges of *inter alia,* conspiring to violate the Lacey Act, smuggling, and money laundering, all with respect to the commercial importation of lobster tails from Honduras, because a small percentage of the tails did not meet certain Honduran regulations such as size limits, and all tails were shipped in clear plastic bags instead of specified boxes. For this regulatory offense, Petitioners Blandford and Schoenwetter were each sentenced to serve *eight years* in prison; Petitioner Huang was sentenced to serve *two years*.

The Honduran Government, through its courts, Embassy, and Attorney General, ruled and declared that the Honduran provisions that served as the predicate for the Lacey Act charges and general verdict were either void *ab initio* or otherwise of no legal effect. A majority of the panel of the court of appeals declined to give deference to the official views of the Honduran Government as to the meaning of its laws. The Questions Presented are:

1. Whether the court of appeals erred and violated due process by failing to give proper deference to the official position of the Honduran Government that its laws and regulations that served as predicate offenses for the criminal convictions were void or otherwise invalid, and on that basis, a reversal of the convictions was required.

2. Whether liability under the Lacey Act may be premised on violations of foreign *regulations*, when the statute plainly provides that liability may be established on actions "in violation of *any law or regulation* of any State or in violation of *foreign law*."

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, David Henson McNab was a defendant/appellant below and is served as a respondent herein.

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PETITION FOR A WRIT OF CERTIORARI

Robert B. Blandford, Abner Schoenwetter, and Diane H. Huang, respectfully petition this Court for a writ of certiorari to review the judgment in this action of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's majority opinion in *United States v. McNab,* as amended, is reported at 331 F.3d 1228 and is reprinted in the Appendix hereto ("App." at 1a). The dissenting opinion of Circuit Judge Fay is reported at 331 F.3d 1247 and is reprinted at App. 33a. The pretrial order and opinion of the district court of October 12, 2000, regarding the determination of foreign and state law and certain motions to dismiss, is unreported and appears at App. 41a. The post-trial order and opinion of the district court of August 28, 2001, regarding further developments in Honduran law is unreported and appears at App. 64a. The order granting the petitions for rehearing in part, and denying the suggestion for rehearing *en banc*, with Circuit Judge Fay dissenting, is reported at 331 F.3d 1228, and is reprinted at App. 80a.

JURISDICTION

The judgment of the court of appeals was first entered on March 21, 2003. Petitioners timely filed petitions for rehearing and suggestions for rehearing *en banc*, and an amended opinion and order granting the rehearing petitions in part and denying the suggestions for rehearing *en banc* was entered on May 29, 2003. The time to file this Petition was extended by Associate Justice Anthony Kennedy to October 24, 2003. The Court has jurisdiction in this case pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND HONDURAN PROVISIONS

The Fifth Amendment to the Constitution provides in relevant part that "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *." The relevant portions of the Lacey Act Amendments of 1981, 16 U.S.C. § 3371, *et seq.*; 18 U.S.C. §§ 2, 371, 545 1956(h), 1957; Fed. R. Crim. Proc. 26.1; Fla. Statute § 370.07; Fla. Admin. Code Ann. r.68B-24.003; Honduran Resolution 030-95; Agreement 0008-93; Article 70(3) of the Fishing Law of 1959; Decree No. 40; Decree No. 157-94; Decree No. 198-2001; Decree No. 245-2000; and related provisions of Honduran law, are set forth in the Appendices to this Petition.[1]

STATEMENT OF THE CASE

Petitioner Robert Blandford is a United States seafood importer who operated his business through his company, Seamerica Corporation and Primestar Foods Incorporated. Petitioner Abner Schoenwetter is also a United States seafood importer operating through Horizon Seafood and Triangle Transport. Together, they would import seafood, including Caribbean spiny lobster tails,[2] and

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[1] Additional materials have been submitted in an Appendix filed by co-defendant David Henson McNab with his separate Petition for Writ of Certiorari. Petitioners here refer the Court to those additional materials, and to the extent provided by the rules and practice of this Court, adopt the arguments made in that Petition.

[2] The Caribbean spiny lobster, *Panulirus argus*, is a species of lobster found in waters from Florida to Brazil, and is not listed as either endangered or threatened under the Endangered Species Act.

sell it to seafood processors and distributors. Petitioner Diane H. Huang, an employee of American Ex-Im Corporation (Ex-Im), a California-based seafood distributor, purchased lobster tails from Seamerica, further processed them at various seafood facilities, and sold the new processed product to large commercial restaurants such as Red Lobster.

Co-defendant David Henson McNab is a Honduran businessman who owns and operates a fleet of fishing vessels that would catch spiny lobsters anywhere from 100 to 350 miles from the coast of Honduras in the Caribbean Sea. From time to time over a period of several years, he would ship the treated and frozen spiny lobster tails in clear plastic bags to the United States where they were consigned to Blandford's company. The shipments would regularly go through inspections at Roatan Island, Honduras, and then be shipped to Bayou la Batre, Alabama, where the lobster tails that were subject to inspection and cleared by U.S. Customs and the Food and Drug Administration (FDA). The lobster tails were resold to dealers such as Ex-Im and other companies for further processing and distribution.

The National Marine Fishery Services (NMFS) received an anonymous facsimile on February 3, 1999 stating that one of McNab's shipments to Seamerica was due to arrive in Alabama on February 5, 1999, and was allegedly carrying lobster tails containing "undersize (3&4oz) lobster tails" that were packed in clear plastic bags instead of cardboard boxes, all of which was alleged to be in violation of Honduran law or regulation.

When the ship arrived, NMFS agents held the ship without explaining why they were doing so. Several weeks later, NMFS transported the frozen lobster tails to a facility

in Florida. Over the next *six months*, NMFS agents and officials traveled back and forth to Honduras and communicated with Honduran regulatory agency employees and officials to try to figure out what Honduran laws or regulations might have been violated by the still uninspected shipment of lobster tails.

The three primary Honduran laws or regulations that were thought to be relevant were (1) Resolution 030-95 issued in December 1995 that allegedly prohibits harvesting lobsters whose tails are less than 5.5 inches (App. 121a)[3]; (2) Regulation 0008-93, a comprehensive regulation specifying in great detail how fish are to be cleaned, processed and packaged, including the provision for packaging in cardboard boxes (App. 115a); and (3) Article 70(3) of the Fishing Law of 1959 which allegedly prohibits the capture of egg-bearing female lobsters (App. 120a).

Armed with the above-listed documents, the NMFS agents at last began to inspect the lobster tails which NMFS had earlier shipped to Florida. The agents discovered that only about three percent of the shipment consisted of tails that were less than 5.5 inches in length, and that some seven percent had evidence of having been egg-bearing. But because the entire load of some 70,000 pounds of lobsters were all packed in bulk clear plastic bags instead of

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[3] The NMFS must have been surprised to learn of the tail size limits of Honduran spiny lobster: the agency's official price sheets available to dealers at the time listed market prices for Honduran spiny lobster tails at two, three, and four ounces. App. 167a. At trial, a government witness testified that approximately fifty percent of all four ounce tails would measure less than 5.5 inches, and that all two and three ounce tails would measure less than 5.5 inches. It is unclear why the NMFS would have an offical price list for seafood it claims are illegal to import.

boxes, they declared that the *entire* shipment was "illegal" and subject to forfeiture.

Not satisfied with seeking substantial forfeiture and severe civil penalties and remedies, federal prosecutors indicted Petitioners and Mr. McNab. They were all convicted by a jury's general verdict on various, but not all the same, counts of conspiracy, smuggling, money laundering, false labeling, and Lacey Act violations with respect to the importation of lobster tails from Honduras over a period of several years. App. 75a.

The underlying premise for the indictment and convictions was the charge that the Petitioners had violated the Lacey Act by importing and selling lobster tails over several years in alleged violation of three Honduran laws and regulations. Thus, the defendants were convicted of "smuggling" lobster tails because they were packaged in clear, transparent plastic bags that were regularly inspected and passed by Customs and FDA inspectors, rather than being packed in opaque cardboard boxes as allegedly required by Honduran regulation; and that a small percentage of the lobster tails imported were found upon closer inspection to have been less than 5.5 inches in length and/or containing evidence of having borne eggs, and thus, in violation of two other Honduran regulations or resolutions. Notably, the Petitioners were not charged with violating the egg-bearing provision. The "money laundering" charges were based simply upon the normal commercial dealer practice of paying for the seafood in question.

At the foreign law hearing to determine the validity of the Honduran regulations upon which the Lacey Act and related charges were predicated, the district court rejected

the expert testimony offered by defendants that Resolution 030-95 governing the size was void *ab initio* inasmuch as it was procedurally defective when it was issued in 1995; that the hygiene Regulation 0008-03 had been repealed in 1995 when its enabling legislation was repealed; and that Article 70(3) was repealed in February 2001 with retroactive effect and otherwise did not proscribe harvesting of egg-bearing lobsters at the time. Instead, the court agreed with the testimony of Liliana Paz, a mid-level official and legal advisor to the Honduran Agriculture Department, that all the laws in question were valid. The court denied the motions challenging the Honduran laws on October 12, 2000. App. 41a.

Although all three Petitioners are hardworking, business persons with families to support and no prior criminal history, Petitioners Blandford and Schoenwetter were each sentenced under the Sentencing Guidelines to draconian prison term of 97 months, or *eight years*. Mrs. Huang was sentenced to prison for 24 months or two years.[4] App. 172a-177a.

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[4] Co-defendant McNab was also sentenced to serve 97 months or eight years in prison. To put this in proper perspective, these severe sentences are comparable to pre-Guideline sentences of *24 years* and *6 years* respectively for first offenders, inasmuch as before 1987, defendants were eligible for, and likely received, parole after serving one-third of their sentence. These sentences are longer than what some drug smugglers receive. *See, e.g., United States v. McPhee*, 336 F.3d 1269 (11th Cir. 2003) (57-month sentence for possessing with intent to distribute 100 kilograms of marijuana on board vessel). Because of the Sentencing Guidelines, the sentencing score was based on the total value of the shipments of unboxed lobsters over a five-year period. The sentencing range computed under the Guidelines was 97 to 121 months. Thus, even though the court sentenced Blandford and Schoenwetter at the "low" end of the range, in order to even meet that level with respect to Schoenwetter, the court had to "break open" one

Following his conviction, defendant McNab launched a legal challenge in the Honduran Court of the First Instance of Administrative Law and was successful in obtaining a ruling that declared on May 23, 2001, that Resolution 030-95 was void *ab initio* because it was defectively promulgated. App. 101a. That decision was affirmed on appeal. App. 112a. The district court conducted a post trial hearing on the foreign law issue, but again rejected McNab and Petitioners' challenge to Honduran law on August 21, 2001.

In the appeals court, the Honduran Government, through its Embassy in the United States, filed an amicus brief advising the court of the *official* position of the Honduran Government that the Honduran regulations in question were either void or of no legal effect due to rulings and subsequent developments in the Honduran courts and Congress, and the convictions were fatally defective. The view also included the Attorney General of Honduras (App. 128a), the Secretary of State for Agriculture and Livestock (App. 143a), and the Honduran Commissioner on Human Rights. Even the federal prosecutor's star witness, Liliana Paz, recanted her testimony after the Honduran court ruling and agreed with defendants that Resolution 030-95 was void retroactively.

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of the maximum sentences of 60 months that normally would have run concurrently, and split it in two, with 37 months running *consecutively* to the other maximum sentence of 60 months in order for the total combined sentence to reach the draconian 97-month minimum. See App. 173a. In short, statutory *maximum* sentences are now being sought by prosecutors and imposed by the courts to impose mandatory *minimums* for first offenders. Members of this Court and other jurists have publicly condemned such harsh and unfair sentences. Prosecutors readily know they can take advantage of the Guidelines when prosecuting citizens for even minor regulatory offenses.

As an initial matter, the court of appeals correctly determined that because all the defendants were convicted by general verdicts based on the three Honduran laws, there was no way to determine on which law the jury based its verdict. Accordingly, "if any of the three Honduran laws * * * were invalid during the time period covered by the indictment, the defendants' convictions must be reversed." App. 17a. (citing *Mills v. Maryland*, 486 U.S. 367, 376 (1988)[5]

Although professing its need to have "consistency and reliability from foreign governments with respect to the validity of their laws," App. 22a, the majority panel refused to rely on the most consistent and reliable sources available to it, and instead, opted to base its decision on the meaning of foreign law on the views of Liliana Paz, a lower-level government employee who testified at trial but later recanted. In the name of "finality," the majority truncated its search for the meaning of Honduran law even though the issue of foreign law is a matter to be decided *de novo,* and notwithstanding that the Petitioners' case was not "final" because it was still on direct review.

Circuit Judge Fay dissented, stating that he would have properly deferred to the official position of the Honduran government, rather than on the recanted

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[5] To the extent that Florida laws were charged against Petitioners, they were lumped with the three Honduran provisions at issue; therefore, there is no way to know if the jury convicted the defendants on Florida or Honduran law. There was only one count that did not depend on Florida or Honduran law: a false labeling charge under the Lacey Act in Count 47 against Petitioner Huang. The court of appeals rejected her challenge to that count without any opinion. No further review on that count is sought in this Court.

testimony of a lower-level employee. Judge Fay concluded that with respect to Resolution 030-95, "what was thought to be a crime turns out not to be a crime under Honduran law," and that "under both U.S. and Honduran law, retroactive application is warranted for a criminal defendant charged or convicted of a subsequently declared invalid criminal statute." App. 36a. *See, e.g., United States v. Goodner Brothers Aircraft*, 966 F.2d 380 (8th Cir. 1992).

On petitions for rehearing, the court deleted a statement in footnote 24 of its original opinion that it was proper to defer to federal prosecutors for the meaning of foreign law rather than the foreign government itself, but otherwise offered no principled reason as to why the official position of the Honduran government as to the meaning and validity of its own laws should be rejected.

REASONS FOR GRANTING THE PETITION

While this case deals with the government's regulation of a natural resource, something infinitely more important is endangered here: the Petitioners' liberty interests and their right to due process. As one jurist poignantly remarked in another fish and wildlife enforcement case:

> We share the dissent's concern about the depletion of natural resources. * * * However, a salutary end may not be accomplished by unlawful means. The protection of individual liberty, as embodied in the requirement that no person be subjected to criminal sanctions except pursuant to lawful authority, is also an important value in a free society. When the twain conflict, the former must yield to the latter.

United States v. Alexander, 938 F.2d 942, 946 n.7 (9th Cir. 1991) (Kozinski, J.). In this case, the Petitioners had a

right to be tried on the basis of a *valid* law. A majority of the panel, however, in its haste to terminate the examination of the validity of the Honduran provisions in question in the interests of "finality," wrongly denied the Petitioners their right to due process.

I. THE PROPER DEFERENCE THAT FEDERAL COURTS SHOULD GIVE TO THE OFFICIAL VIEWS OF A FOREIGN GOVERNMENT ON THE MEANING AND VALIDITY OF ITS OWN LAWS RAISES AN IMPORTANT QUESTION OF FEDERAL LAW THAT WAS DECIDED BY THE COURT BELOW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT, ANOTHER PANEL OF THE ELEVENTH CIRCUIT, AND OTHER COURTS OF APPEALS, AND DENIES DUE PROCESS

A. The Question Is of Exceptional Importance

The level of deference that federal courts should give to foreign countries as to the meaning of their own laws raises a question of exceptional importance in the administration of justice that implicates sensitive issues of foreign relations, the act of state doctrine, international comity, and the rule of law. The question is all the more important in this case because its answer will determine whether Petitioners will be incarcerated for up to eight years in federal prison for importing lobster tails that allegedly did not comply with certain Honduran fishing laws and regulations that have been since ruled void or repealed, and without legal effect.

Because of our growing global economy, increasing international trade, and bilateral and multilateral commitments in a number of substantive areas, including commercial, tax, and environmental matters, it is apparent that more disputes, including increased enforcement of the Lacey Act, will end up in federal courts. Those courts will be called upon to interpret and apply foreign laws and regulations in the administrative, civil, and criminal contexts. Accordingly, the proper standard of deference

that a federal court should accord a foreign country's interpretation of its own laws is not only an important issue, but also an increasingly recurring one, that should and can be resolved by this Court in order to ensure consistency in this area of foreign relations.

The importance of this issue and the need to decide it are further underscored by the extraordinary reaction from a sovereign country to the misinterpretation of its laws that served as predicate to convict and incarcerate one of its citizens for eight years in the United States.

Not only has the Embassy of Honduras filed two briefs in the court of appeals objecting to the misinterpretation of its laws (one at the merits stage, and the second in support of the rehearing petition), it is also expected to file its views in this Court in support of the parties' petitions. In its briefs filed below, the Republic of Honduras noted that the trial court ruling "has had and will continue to have a chilling effect on the Honduran fishing industry, were it to stand. Principles of international law and comity are threatened by the District Court's ignoring the authoritative exposition of Honduran law by the relevant Honduran legal authorities." Brief Amicus Curiae of the Embassy of Honduras at 4. To ignore the "official Honduran Governmental position * * * would be an unprecedented violation of international law." Brief Amicus Curiae of Embassy of Honduras on Rehearing, at 11.

The Republic of Honduras has formally submitted its position on the matter with the U.S. Department of State, and included the official position of the Honduran Ministry of Agriculture and Livestock confirming that Resolution 030-95 was void *ab initio*. *Id.* at 11, n.14.

Both the former and current Attorneys General of the Republic of Honduras, the legal representative of Honduras who is constitutionally empowered to opine as to the validity of Honduran laws, have formally issued their opinions about the meaning of Honduran law in this case. App. 124a-128a. Finally, the National Human Rights Commission of the Republic of Honduras has further stated

its agreement that the Resolution was void and that one of its citizens is being illegally incarcerated and denied his human rights.

Because of the important international implications of the question presented and its impact on the proper administration of justice, a writ of certiorari should issue to the court of appeals on this ground alone. *See, e.g.*, *Christopher v. Harbury*, 536 U.S. 403, 412 (2002) (review granted because of foreign affairs implications); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

B. The Decision Below Conflicts With Decisions of this Court, the Eleventh Circuit itself, and the Second, Seventh, and District of Columbia Circuits.

This case warrants review by the Court because the decision below is inconsistent with or conflicts with decisions of this Court and lower federal courts with respect to the proper deference due a sovereign nation's interpretation of its own laws and judicial decisions. This case is a particularly suitable vehicle to answer this question because it is one where the foreign government itself has vigorously disputed the misinterpretation of its laws by United States courts, and as noted, is expected to file its views in this Court in support of this petition.

A majority panel of the court of appeals, in its attempt to interpret the meaning and validity of Honduran law and regulations that served as the predicate for the criminal convictions in this case, utterly failed to give any meaningful deference to the authorized representatives of the Honduran government, namely, the Embassy of Honduras, the Attorney General of Honduras, and other high-ranking officials authorized to represent the Republic of Honduras. Although professing its need to have "consistency and reliability from foreign governments with respect to the validity of their laws," App. 22a, the majority panel refused to rely on the most consistent and reliable sources available to it, and instead opted to base its decision on the meaning of foreign law on the views of a

few lower-level government employees proffered at trial. The failure by the panel majority to accord deference to the official views of the Honduran government is in conflict with decisions of this Court and other circuit court, and violated Petitioners' right to due process.

1. Courts and international law recognize the deference to be given to the "official voice" of a foreign government when determining its laws. International legal principles, such as the act of state doctrine, limit "for prudential rather than jurisdictional reasons, courts in the United States from inquiring into the validity of a recognized foreign sovereign's public acts committed within its own territory." *Honduras Aircraft Registry, Ltd. v. Gov't of Honduras*, 129 F.3d 543, 550 (11th Cir. 1997) cited in *Fogade v. ENB Revocable Trust*, 263 F.3d 1274, 1293 (11th Cir. 2001). A "public act" has been defined to include "a statement made by someone with the authority to exercise sovereign power." Restate. Third of Foreign Relations Law of the United States, §443, Reporter's Note 3. These acts include a sovereign's right to regulate its exports and industries. *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328-29 (9th Cir. 1984).

The United States does not ordinarily question the official acts of foreign governments because to do so would "very certainly imperil the amicable relations between governments and vex the peace of nations." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918). In this case that "official voice" came from the Honduran Embassy, which, like all embassies, has a presumption of authority. *Aquamar v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1297 (11th Cir. 1999). "[A]mbassadors have broad powers to bind the countries they represent." *Id.* Indeed, the Eleventh Circuit concluded in *Aquamar* that the district court "should have accepted [the Ambassador's] authority to [act] on behalf of Ecuador." *Id.* at 1293. In doing so, the court correctly noted that foreign policy considerations should caution against "questioning an ambassador's representations on behalf of his or her country before the courts * * * would implicate the act of state doctrine." *Id.* at 1298-99. Notably, the majority failed to heed, let alone

cite, its own *Aquamar* ruling.

In addition, other circuits have consistently accorded substantial deference and regard to the official views of foreign governments in litigation. In *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998), the Second Circuit was persuaded by "the official position of the Ecuadorian Ambassador," rather than the position taken by the Ecuadorian Congress. *Id.* at 162. Ambassadors' powers are also rooted in international treaties. The Vienna Convention on Diplomatic Relations directs Ambassadors to "represent * * * the sending State in the receiving State" and to "protect * * * the interests of the sending State and its nationals." Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Art. 3, 23 U.S.T. 3227, 3232, 500 U.N.T.S. 95. The Second Circuit was subsequently faced with a problem of determining Indonesian law in *Karaha Bodas Co. v. Perushahaan Pertambangan*, 313 F.3d 70 (2d Cir. 2002). In *Karaha*, there was a dispute as to the owner of certain funds derived from the sales of natural gas by an oil and gas company owned by Indonesia. Even though Indonesia had a pecuniary interest in the outcome, the Second Circuit deferred to the official views of Indonesia to decide competing interpretations of Indonesian law.

In *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7th Cir. 1992), the Seventh Circuit had to interpret the meaning of a French law in order to determine liability of the parties for an oil spill cleanup. While each side offered competing experts on the meaning of French law, the court properly deferred to the French government rather than to the private parties' views: "A court of the United States owes substantial deference to the construction France places on its domestic law * * * . Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable." *Id.* at 1312.

In a pair of decisions arising out of the same case, the D.C. Circuit ruled that the official view of Brazil's tax laws by its Minister of Finance controlled as to whether certain foreign tax credits were available to a U.S. company. In *Riggs Nat'l Corp. & Subsidiaries v. Comm'r*

of IRS, 163 F.3d 1363 (D.C. Cir. 1999) (*Riggs* I), the court concluded that because the U.S. Tax Court's interpretation of Brazilian law conflicted with the Brazilian's Minister's ruling, the Tax Court ruling could not stand. *Id.* at 1368. The D.C. Circuit concluded that under the act of state doctrine, the "acts of an executive official such as the Minister are valid and binding until declared invalid by a Brazilian court." *Id.* In a subsequent related ruling, the D.C. Circuit again reversed the Tax Court's rejection of certain bank records of the Central Bank of Brazil as violative of the "presumption of regularity" of the actions and records of foreign public officials. *Riggs Nat'l Corp. & Subsidiaries, v. Comm'r of IRS*, 295 F.3d 16, 18 (D.C. Cir. 2002) (*Riggs* II).

In this case, the court below failed to refer to, let alone distinguish, any of these compelling decisions by its own and sister circuits. Rather, the majority was satisfied to offer only lip-service to the views of the Honduran government: "[b]y our decision today, we do not mean to impinge upon any foreign government's sovereignty." App. 39a. While the majority claims that it did not "mean to impinge upon a foreign government's sovereignty," it did so to a very significant and troubling degree.

2. The majority's stated reasons for departing from the requirement to defer to a foreign government's views of its laws, and for short-circuiting its search for authoritative sources to interpret Honduran law in a *de novo* proceeding, evidence a profound misunderstanding of the duty of the court to determine foreign law, raise serious due process questions, and have the potential for undermining our international relations and Congress' purpose for amending the Lacey Act to encompass violations of foreign laws. Thus, the court of appeals so departed from the usual course of proceedings in which foreign law is to be determined so as to "call for an exercise of this Court's supervisory power." *See* S. Ct. Rule 10(a).

a. The fundamental flaw in the panel majority's reasoning for disregarding the Honduran Embassy's view is its characterization that the Honduran government allegedly

"shifted" its position from the trial court to the one made in the court of appeals. But there was never any "shift" in the government's position. The government's position was officially made only at the court of appeals level in its submission of an amicus brief and other formal communications presenting the views of the Republic of Honduras on Honduran law. As Judge Fay succinctly stated in his dissent:

> For emphasis, I repeat again that the majority opinion discusses extensively and is strongly critical of the changed position or shift by the Honduran government. While that terminology may give comfort to the majority, it is simply not accurate. While various government officials gave conflicting opinions regarding the validity of Resolution 030-95, this was before the Honduran courts ruled. The Honduran courts have now ruled and both agree, Resolution 030-95 was null and void. The majority casts this in an unfavorable light akin to something sinister. In my opinion, this is no different than what occurs routinely in our country. Attorneys, and even the Attorney General of a state or the United States, often express opinions about statutes only to find that after a court challenge, they were wrong. That is all that happened here. Some of the experts were right; some were wrong. But, the Honduran courts have now spoken and there is simply no doubt that Resolution 030-95 is null and void as if it never existed.
>
> To suggest that the newly issued statements and opinions of Honduran officials do not carry the weight of the earlier statements is a strange position for members of the judiciary. The so-called "shift in position" is the result of lawful litigation within the courts of a foreign nation. I think we would be shocked should the tables be reversed and a foreign nation simply ignored one of our court rulings because it caused some frustration or inconvenience.

App. 22a. As previously noted, the only Honduran official relied upon by the district court at the foreign law hearing was Liliana Paz, a lower-level official who served as counsel to the Agricultural Ministry. In her testimony, she was of the opinion that Resolution 030-95 was valid and enforceable. But after the crucial ruling by the Honduran Administrative Court that vindicated Mr. McNab's position that Resolution 030-905 was null and void, Ms. Paz recanted her earlier testimony and filed a post-conviction Affidavit with the trial court forthrightly indicating that in light of the intervening Honduran Administrative court decision, her prior testimony was in error.

Thus, the majority not only fails to give deference to the official position of the Honduran government, it blindly insists that the "district courts and the government of the United States * * * have the right to rely upon" Ms. Paz's now-recanted testimony. App. 22a. It was error for the majority to put more stock in recanted testimony than in a more reliable testimony and evidence based on subsequent legal developments that clarified the law.[6] The majority appeared to base its rush to judgment on determining foreign law during a *de novo* proceeding for its desire to achieve "finality" with the process and proceedings that determine foreign law, notwithstanding that this case was not final and that *de novo* proceedings on matters of law remain open for the purpose of determining the current state of the law at the time of the relevant level of review.

b. More troubling, the majority's additional reason for disregarding the Honduran government's views and instead focusing on "finality" in the search for the meaning of Honduran law was the suggestion that criminal defendants with "means and connections" might

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[6] Ms. Paz was apparently not even duly authorized to provide the trial court with Honduras' official view of its laws. For that reason alone, her testimony should have been rejected. *See Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (court declines to rely on an unauthorized foreign official's interpretation of foreign law).

> lobby[] and prevail[] upon that country's officials to invalidate a particular law serving as the basis for his conviction in the United States. Such a scenario would completely undermine the purpose of the Lacey Act. There would cease to be any reason to enforce the Lacey Act, at least with respect to foreign law violations, if every change of position by a foreign government as to the validity of its laws could invalidate a conviction.

App. 13a. The majority's suggestion that improper pressure or bribes might produce a result that would foreclose a court from examining a possible Lacey Act violation is simply not true. Federal courts would not be bound to the "paid" views of foreign officials in such circumstances. In *United States v. Labs of Virginia, Inc.*, 2003 U.S. Dist. LEXIS 12900 (July 22, 2003), the district court noted:

> The corruption exception to the act of state doctrine also seems applicable in this case. Under this exception, "even an unrepudiated act of state may be scrutinized by the courts if it resulted from the corruption of government officials." *Dominicus Americana Bohio v. Gulf & W. Indus., Inc.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979) (citing *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977)). This exception rests on the concept that allegations of wrongdoing on the part of foreign sovereigns' agents are "beyond the umbrella of the Act of State Doctrine" because "such activity would be violative of the Foreign Corrupt Practices Act of 1977 * * * and * * * to shield such activity would be violative of the spirit of the Act." See *Sage Int'l, Ltd. v. Cadillac Gage Co.*, 534 F. Supp. 896, 910 (E.D. Mich. 1981).

Id. at *20, n.5. There certainly was no indication or suggestion in this case that the Honduran court rulings and official government views were improperly procured in any way; accordingly, the majority's speculation about hypothetical abuses is simply no good reason to forego the

deference due to Honduras in this case.

c. The majority proffered an equally noxious reason for ignoring the Honduran government: a favorable ruling for the defendants in this case may set a precedent for defendants to challenge the validity of laws and regulation that the government used to deprive them of their liberty and property.

> Acceptance of the Honduran government's current interpretation of its laws as determinative of the validity of the laws would set the foundation for future Lacey Act defendants to seek postconviction invalidation of the underlying foreign laws.

App. 13a. This justification for ignoring the views of a foreign government is repugnant to the due process rights of convicted defendants to challenge the validity of *any* law -- whether local, state, federal, or foreign -- that served as the basis for a defendant's prosecution and conviction. This Court should not tolerate such a threat to liberty and the rule of law.

d. As a related reason for ignoring the views of the Honduran Government, the majority claims those views may differ from those given initially to federal law enforcement by low-level foreign government employees. This state of affairs allegedly

> would completely undermine the purpose of the Lacey Act. There would cease to be any reason to enforce the Lacey Act, at least with respect to foreign law violations, if every change of position by a foreign government as to the validity of its laws could invalidate a conviction.

App. 14a. As previously noted, the majority couched its preference to limit its search for the authoritative interpretation of foreign law on the basis of finality: "there must be some finality with representations of foreign law by foreign governments." In the first place, there was never any "change of position of the foreign government" as to

the validity of the laws in question.

More importantly, accepting the authoritative views of a foreign government as to the validity of its own wildlife and fishing laws would not "undermine the purpose of the Lacey Act." To the contrary, the Lacey Act should not be viewed "as increasing the federal role in managing wildlife, but as a federal tool to aid the states [and foreign governments] in enforcing their own laws concerning wildlife." S. Rep. No. 123, 97th Congress, 1st Sess. (1981), reprinted in 1981 U.S.C.C.A.N. 1748. The Act "improves existing Federal tools designed *to aid states and foreign nations in enforcing their own wildlife laws.*" S. Rep. No. 736, 97th Congress, 1st Sess., 127 Cong. Rec. 4737 (1981) (remarks of Senator Chaffee). In this case, the Republic of Honduras has declared that its predicate laws are invalid and unenforceable in their own country, and thus, do not want the aid offered and given by the federal prosecutors and regulators here; in fact, Honduras affirmatively and officially rejects this assistance as a matter of their own law. Thus, it is the decision by the court of appeals that twists and undermines the Lacey Act, and in so doing, puts a strain on the relations between the United States and Honduras.

C. This Court Should Grant Review Because of the Due Process Question Presented by the Court of Appeals' Refusal to Consider Authoritative Sources of Honduran Law in the Interests of "Finality."

This case also raises the precise issue on which this Court recently granted certiorari, whether due process requires changes in the criminal law to apply retroactively to pending criminal prosecutions. In *Fiore v. White*, 531 U.S. 225, 226 (2001), this Court "granted certiorari in part to decide when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." This Court ultimately disposed of that case on other grounds, namely that there was only a clarification, not a new interpretation, of a state criminal statute.

This case presents the issue left open in *Fiore*. The federal government obtained a conviction based on violation of a Honduran regulation that a Honduran court has since declared void. The panel majority refused to apply on a retroactive basis the Honduran court's ruling to this prosecution in the interest of finality. Indeed, in *Fiore* this court granted certiorari to address the intersection of due process and finality even though the conviction was final and the case reached this Court through writ of habeas corpus. Here, in contrast, the conviction is not final but is still on direct review. Thus there is an even stronger due process claim, and weaker interest in finality, at issue on this appeal. In addition, this Court recently rejected the panel majority's concern with finality. *See also Bunkley v. Florida*, 123 S. Ct. 2020 (2003).

II. WHETHER THE LACEY ACT'S "FOREIGN LAW" PROVISION ENCOMPASSES VIOLATIONS OF FOREIGN REGULATIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT WAS DECIDED BY THE COURT OF APPEALS IN A WAY THAT DOES VIOLENCE TO CARDINAL RULES OF STATUTORY CONSTRUCTION, INCLUDING THE RULE OF LENITY, AND IMPLICATES THE REACH OF OTHER FEDERAL STATUTES.

The Lacey Act provides in pertinent part that "it is unlawful for any person * * * to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce * * * any fish or wildlife taken, possessed, transported, or sold in violation of any *law or regulation* of any State or in violation of any *foreign law*." 16 U.S.C. § 3372(a)(2)(A) (emphasis added). The Petitioners argued below that even if the Honduran regulations and resolutions were valid, Congress did not make the violation of such foreign *regulations* a predicate offense for a Lacey Act criminal charge as it did for the violation of a State regulation, or for that matter, for the violation of a "*regulation* of the United States." 16 U.S.C. § 3372(a)(1) (emphasis added). Rather, Congress quite clearly limited

the scope of the Lacey Act only to foreign *law,* the same term Congress used when referring to State *law* and United States *law*, namely, statutory law, not regulations. Under settled canons of statutory interpretation, foreign regulations may not serve as a predicate for liability under the Lacey Act, and no resort to legislative history is required or permitted.

In effectively rewriting the Lacey Act for Congress, the court of appeals simply decreed that "regulations and other such legally binding provisions that foreign governments may promulgate to protect wildlife [and fish] are encompassed by the phrase 'any foreign law.'" App. 13a. By engaging in this act of judicial lawmaking, the court of appeals did violence to cardinal rules of statutory construction, impermissibly resorted to a selective examination of extrinsic legislative materials, and speculated as to the legislators' shortcomings for failing to expressly include foreign regulations as a predicate for liability under the Lacey Act.

Even if extrinsic legislative material were examined, one would find that in 1981 Congress not only expressly *repealed* the predecessor Lacey Act which explicitly made a violation of a foreign "regulation" a predicate offense -- and thereby rejected a broader reading of "foreign law." Congress also rejected a proposed definition in the amending legislation that would have expressly *included* foreign "regulations" within the definition of "foreign law." At the very least, whether the term "foreign law" in the Lacey Act includes foreign regulations is ambiguous; under such circumstances, the court of appeals should have applied the Rule of Lenity in this criminal proceeding and narrowly construed the term to exclude foreign regulations.

Accordingly, review of the court of appeals' judgment on the issue is warranted because of the

fundamental importance of the issue, both in terms of grave consequences to Petitioners and others similarly situated who have been, or are being, unfairly targeted for criminal prosecution and lengthy incarceration for minor foreign regulatory infractions under the Lacey Act, and this issue is likely to arise in many other statutory settings based on foreign "law" as the globalization of America's markets increases. The judgment below is also inconsistent with this Court's decision in *United States v. Eaton*, 144 U.S. 677, 688 (1892), a decision that has spawned some confusion in other courts interpreting the definition of "law."

1. In determining the meaning of the words of a statute, the plain meaning doctrine requires that the court give effect to the unambiguous meaning of those words unless Congress has specified otherwise. *Circuit City Stores v. Adams*, 532 U.S. 105, 115-19 (2001). The meaning of the term "foreign law" in 16 U.S.C. § 3372(a)(2)(A) can easily be determined by examining both the text and context of the words as they appear in the statute without the need to examine legislative history. Section 3371(d) of the Lacey Act states as follows:

> The terms "law," "treaty," "regulation," and "Indian tribal law" *mean* laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.

16 U.S.C. § 3371(d) (emphasis added). This definition is somewhat circular and not helpful as the lower court found.

The lower court discovered both broad and narrow dictionary definitions of the word "law," ranging from a "binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority" to "law" as simply "[a] statute." App. 12a. The court conceded, however, that this latter and narrower definition of "law" proffered by the defendants, namely, that foreign law meant foreign statutes, was both "plausible" and "reasonable" because, as the court of appeals correctly noted, "to read

'any foreign law' to include regulations would render the word 'regulation' in the earlier phrase any law or regulation of any State meaningless. App. 13a.

Further, the court correctly recognized that "[a] basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage.'" App. 13a. (citing *United States v. Canal-Jimenz*, 543 F.2d 1284, 1287 (11th Cir. 1991)). *See also Circuit City*, 532 U.S. at 113 (Court has "deep reluctance" to interpret one portion of a statute so as to render superfluous other language in the same Act.); *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word"). Under this canon, the term "law" must mean a legal commandment that is *different* from a "regulation"; otherwise, the word "regulation" would be superfluous each time it is used in the statute.

The court of appeals should have halted its inquiry right there, or at least fully applied this "basic premise" and other corollary canons of construction by examining other *textual* provisions of the Lacey Act where Congress used the term "regulation" in a manner distinct from the term "law."[7] Instead, the court of appeals violated these fundamental rules of construction in favor of speculation as to the perceived difficulty of legislating. Instead of ending its inquiry with the statute's text, the court proceeded to cite the Ninth Circuit's speculation that "Congress would be hard pressed to set forth a definition [of foreign law] that

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[7] *See, e.g.*, 33 U.S.C. § 3373(a)(1) (providing for civil penalties for "violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State").

would adequately encompass" the "wide range the forms of law may take given the world's many diverse legal and governmental systems." App. 13a. (citing *United States v. 594,464 Pounds of Salmon,* 871 F.2d 824 (9th Cir. 1989); *United States v. Lee*, 937 F.2d 1388, 1391-92 (9th Cir. 1991)). The court then bootstrapped the Ninth Circuit's manufactured excuse for Congress' shortcomings to conclude that the term "foreign law" was ambiguous enough to justify the court's reliance on legislative history.

But Congress was not at all "hard pressed," as the lower court and Ninth Circuit speculated, to draft a sufficiently broad and comprehensive definition of foreign law if it really wanted one. Certainly, the court itself did not find itself "hard pressed" to draft language that it thought Congress must have intended, when it decreed that for purposes of the Lacey Act, "foreign law" means "regulations and other such legally binding provisions that foreign governments may promulgate to protect wildlife [and fish]." App. 16a. Indeed, Congress demonstrated that it was quite up to the legislative task of drafting very similar language in the Lacey Act itself when it wanted to define the more exotic species of "Indian tribal law" as follows:

> The term 'Indian tribal law' means any regulation of, or other rule of conduct enforceable by, any Indian tribe, band, or group * * * .

16 U.S.C. § 3371(c). See *United States v. Big Eagle*, 881 F.2d 539, 541-42 (8th Cir. 1989) (Agreement between State and Indian Tribe fits within Lacey Act's broad definition of "Indian Tribal law"). In short, Congress can craft all-encompassing language when it wants to, and the court was neither required nor permitted to supplement Congress' lawmaking in this manner.

The court's decision to arrogate to itself the ability to supplement Congress' lawmaking not only violated the canons of statutory construction, but the court's premise for doing so fails on its own terms. The court failed to consider the myriad of other laws where Congress distinguished between the terms "foreign law" and "foreign

regulations," including wildlife protection laws similar to the Lacey Act.[8] The court never explained why, if Congress is able to include foreign "regulations" in so many of these other statutes, Congress was unable to do so in the Lacey Act. The court's flawed premise notwithstanding, under the settled canons of statutory interpretation "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994)); *Haas v. Internal Revenue Service*, 48 F.3d 1153 (11th Cir. 1995) ("Where Congress knows how to say something but chooses not to, its silence is controlling").

2. Even if the court were permitted to review legislative history, its review of that history was flawed. Simply stated, the Lacey Act used to, but no longer, says what the court wishes it said now. Until the comprehensive amendments of 1981, the Lacey Act proscribed the transportation of wildlife "in violation of any law *or regulation* of any State or foreign country." (formerly 18 U.S.C. § 43(a)(2) (emphasis added). The Lacey Act

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[8] *See, e.g.*, 19 U.S.C. § 1527 (restricting the importation of wildlife contrary to "the *laws or regulations of any country*, dependency, province, or other subdivision of government") (emphasis added); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (alien inadmissible if convicted of "any *law or regulation* of a State, the United States, or a foreign country relating to a controlled substance * * *) (emphasis added); 22 U.S.C. § 4342(c) ("importation, sale, or other disposition of personal property within a foreign country which violates its *laws or regulations* or governing international law * * * shall be grounds for disciplinary action against an employee") (emphasis added); 10 U.S.C. § 2324(d)(2)(D) (describing "payments of fines and penalties resulting from violations of, or failure to comply with, Federal, State, local, or *foreign laws and regulations*") (emphasis added).

Amendments of 1981 expressly repealed both the entire Lacey Act and the Black Bass Act. 16 U.S.C. 3378(b)(1), (2). During the amendment process, Congress considered and rejected an expansive definition of "foreign law" in the original Senate bill.

> Sec. 2. For purposes of this act --
> * * *
> (b) The term "foreign law" means laws *or regulations* of a foreign country which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife.

S. 736, 97th Cong., 1st Sess., 127 Cong. Rec. 4338 (March 19, 1981) (emphasis added). In the final version of the bill as passed by the Senate, this definition of "foreign law" was replaced with the somewhat circular definition in Section 2(d), which is the current version in the law. 16 U.S.C. § 3372(d).

In short, Congress passed up the opportunity to adopt the broader definition of "foreign law" that the lower court insisted Congress surely meant to insert into the Lacey Act Amendments. By both repealing the pre-1981 foreign "law or regulation" provision, and rejecting the broad proposed definition of "foreign law" that included foreign "regulations," Congress meant what it said, and said what it meant. *Circuit City*, 532 U.S. at 115-19. That should have been the end of the inquiry into legislative history. Congress is presumed to act "intentionally and purposefully" when it decides to include or exclude provisions from the law it enacts. *Bates v. United States*, 522 U.S. 23, 30 (1997).

Instead, the court grudgingly conceded only that "certain parts of the legislative history of the Lacey Act [ ] support the defendants' position to some extent." App. 15a. Treating this stingy concession as a mere nuisance, the court proceeded to discover that "Congress clearly stated that the amendments were meant to strengthen the existing wildlife protections laws and to 'provide [the government] the tools needed to effectively control the

massive illegal trade in fish, wildlife and plants.'" App. 15a. But these "clear statements" by the "Congress" turn out to be simply remarks by Senator Chafee and Congressman Breaux. They do not compel a rejection of the textual analysis discussed since many provisions of the new law, such as increased penalties and the like, are not affected by a narrow reading of the term "foreign law."

As this Court has declared: "It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). And, as Justice Scalia has admonished, "The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 610 (1993) (Scalia, J., concurring). In amending the Lacey Act, Congress rejected the term "regulation" when describing foreign law, and thus limited the scope of the Lacey Act only to foreign law that did not include foreign regulations. "[A]nd if that is not what Congress meant, then Congress has made a mistake and Congress will have to correct it." *Id.* at 528 (Scalia, J., concurring.).

3. Review is also warranted because the lower court's conclusion that the term "law" also encompasses the term "regulation" is inconsistent with a decision of this Court that has caused some confusion among the lower courts that have addressed the issue. In *United States v. Eaton,* 144 U.S. 677 (1892), this Court held that a failure to comply with a *regulation* promulgated pursuant to a statute did not subject a defendant to penalties prescribed in that statute for "omit[ting], neglect[ing], or refus[ing] to do, or caus[ing] to be done, any of the things *required by law*," 144 U.S. at 685 (emphasis added), on the grounds that "[i]f Congress intended to make [violation of the *regulation*] an offence[,] * * * it would have done so distinctly." *Id.* at

688. This Court reasoned that to expand the word "law" to include "regulation" would be "a very dangerous principle." *Id.*[9]

In short, this Court should grant review in order to clarify its prior decisions on the issue and to provide necessary guidance to the lower courts.

4. While Petitioners maintain that a proper interpretation of the Lacey Act demonstrates that foreign regulations are not encompassed in the term "foreign law," at the very least, its meaning is ambiguous to trigger the application of the Rule of Lenity.

The Rule of Lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his

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[9] Admittedly, the Court in *United States v. Howard*, 352 U.S. 212 (1957), ruled that the prior Lacey Act, which at the time provided for violations of only "state law," and not foreign law, encompassed certain state regulations where the state law *expressly* made it an offense to violate regulations promulgated thereunder. But that decision is of limited import in this case because the violation of one or more of the Honduran regulations at issue may result only in small civil penalties, not criminal penalties. Furthermore, prior to its flawed decision in *United States v. 594,464 Pounds of Salmon,* the Ninth Circuit held that a statute prohibiting operation of an "illegal gambling business," defined as a gambling business that "is a violation of the *law* of a state or political subdivision in which it is conducted," does not apply to a Nevada Gaming Commission *regulation* that leads only to civil sanctions. *United States v. Gordon*, 464 F.2d 357, 357-58 (9th Cir. 1972) (per curiam). And in *United States v. Mitchell*, 39 F.3d 465 (1994), Circuit Judge Murnaghan vigorously dissented from the majority finding that the anti-smuggling provisions of 18 U.S.C. § 545, which prohibits importing merchandise "contrary to law," is "unarguably ambiguous" with respect to whether it covers importing merchandise contrary to *regulations*, and thus, the rule of lenity requires reversal of conviction. *Id.* at 476 (Murnaghan, J., dissenting).

conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979) (citations omitted). *See also Rewis v. United States*, 401 U.S. 808, 812 (1971). As this Court has noted, "[w]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222 (1952).

Accordingly, the court below erred by not applying the Rule of Lenity, not only with respect to the meaning of the term "foreign law," but also with respect to the ambiguity there may have been with respect to the meaning of Honduran Law as discussed in Point I.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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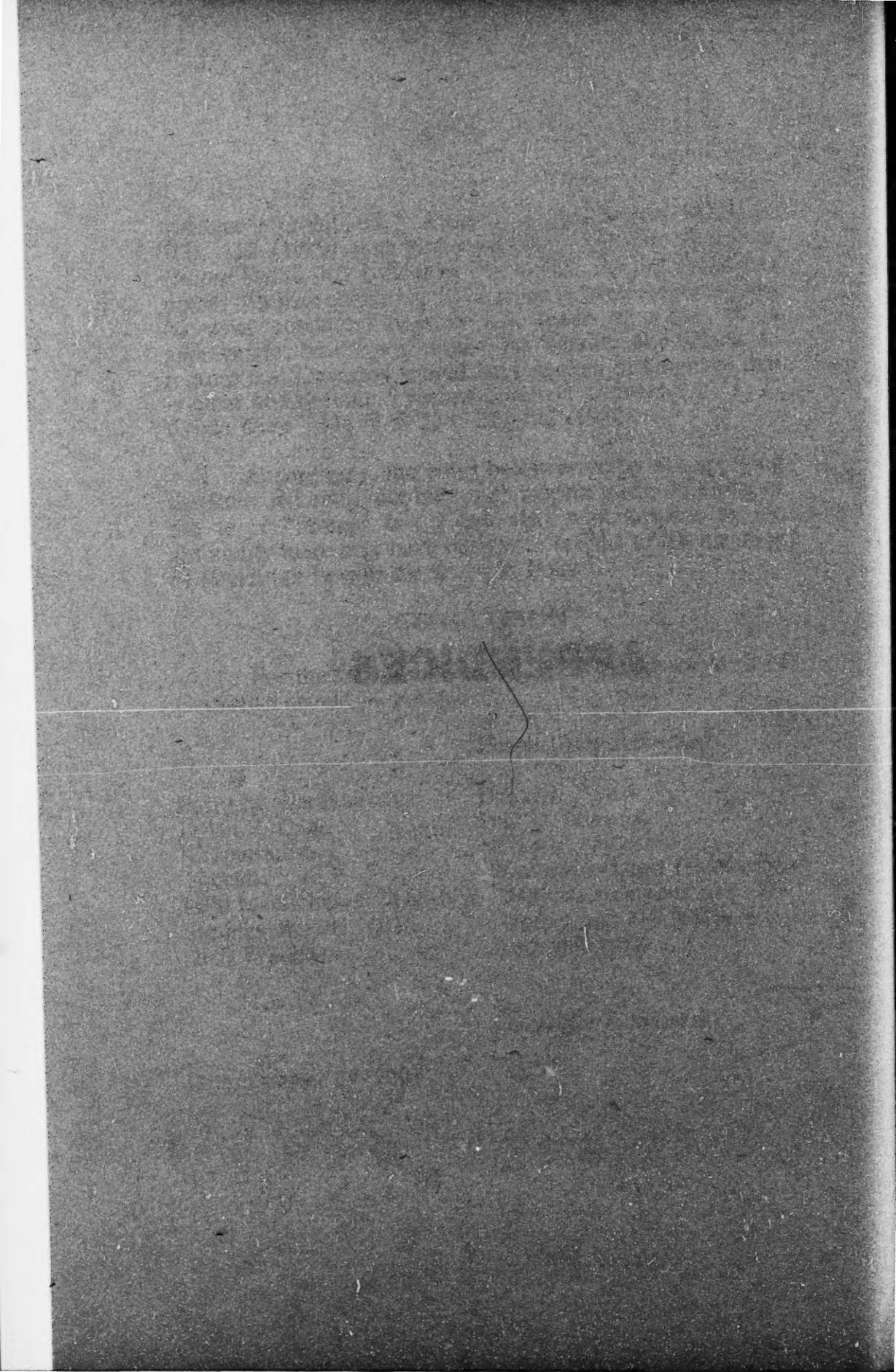

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15148, No. 02-10810, No. 02-11264

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DAVID HENSON MCNAB, ROBERT D. BLANDFORD, et al., Defendants-Appellants. UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ABNER SCHOENWETTER, ROBERT D. BLANDFORD, Defendants-Appellants. UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DAVID HENSON MCNAB, ABNER SCHOENWETTER, et al., Defendants-Appellants.

March 21, 2003, Decided
March 21, 2003, Filed

As Amended May 29, 2003. Modified and rehearing denied by *United States v. McNab, 331 F.3d 1228, 2003 U.S. App. LEXIS 10708 (11th Cir. Ala., May 29, 2003)*

JUDGES: Before HULL, WILSON and FAY, Circuit Judges. FAY, Circuit Judge, dissenting.
OPINION: WILSON, Circuit Judge:

The Court hereby substitutes the following opinion in place of the opinion which was issued on March 21, 2003.

David Henson McNab, Abner Schoenwetter, Robert D. Blandford, and Diane H. Huang (collectively the defendants) appeal the convictions and sentences they received after a jury found them guilty of conspiracy, smuggling, money laundering, and Lacey Act violations in connection with the importation, sale, and purchase of Caribbean spiny lobsters from Honduras. The defendants' main argument on appeal is that the district court erred in determining that the Honduran laws that served as the underlying basis of their convictions were valid and enforceable. The defendants contend that the Honduran laws were invalid, and, therefore, there was no violation of foreign law upon which to base their convictions. [1]

The defendants' challenge to the validity of the Honduran laws requires us to undertake our own foreign law determination. Our task is complicated by conflicting representations from Honduran officials regarding the validity of the Honduran laws. Throughout the investigation and trial, Honduran officials offered support and assistance to the United States government, and both the government and the district court relied upon the Honduran officials' verification of the Honduran laws. Shortly after the defendants were convicted, the Honduran government reversed its position; it currently refutes the validity of the laws it previously verified. Therefore, we must decide

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[1] The Lacey Act prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." *16 U.S.C. § 3372(a)(2)(A)*. If the lobsters were not imported, transported, and sold in violation of Honduran law, there could be no Lacey Act violations. Accordingly, if the lobsters were brought into the United States legally and were not criminally-derived property, there could be no smuggling or money laundering violations.

whether our courts are bound by a foreign government's new representations regarding the validity of its laws when its new representations are issued only postconviction and directly contravene its original position upon which the government and our courts relied and the jury acted. This question is a matter of first impression in this Circuit and apparently the other circuits as well.

For the reasons set forth below, we affirm the defendants' convictions and sentences.

BACKGROUND

On February 3, 1999, agents of the National Marine Fisheries Service (NMFS) received an anonymous facsimile, which provided that McNab's cargo transport vessel, the M/V Caribbean Clipper, would arrive in Bayou la Batre, Alabama on February 5, 1999, with a shipment of lobsters containing "undersized (3 & 4 oz) lobster tails, [which was] a violation of Honduran law." The facsimile further provided that Honduras prohibits the bulk exportation of lobsters and requires that lobsters be packed in boxes for export.

In response to the anonymous tip, NMFS agents consulted the Direccion General de Pesca y Acuicultura (DIGEPESCA) in Honduras [2] regarding the legality of the lobster shipment referenced in the facsimile. The NMFS agents questioned whether the shipment violated the Lacey Act, which makes it unlawful to import into the United States "fish or wildlife [that has been] taken, possessed, transported, or sold in violation of . . . any foreign law." *16 U.S.C. § 3372(a)(2)(A)*. In three separate letters responding to the agents' inquiry, the director general of the DIGEPESCA described some of Honduras's fishing laws and confirmed

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[2] The DIGEPESCA is the agency within Honduras's Secretaria de Agricultura y Ganaderia (SAG) that is responsible for the enforcement of the fishing laws and the execution of fishing programs.

that McNab's shipment "ha[d] been illegally transported in violation of the Fishing Law, the Industrial and Hygienic Sanitary Inspection Regulation for Fish Products and Resolution No. 030-95." The director general provided authentic copies of the applicable laws and stated that the DIGEPESCA was ready to support all efforts by the government to prosecute persons who violate the Lacey Act.

In early March of 1999 NMFS agents seized the lobster shipment that was referenced in the anonymous facsimile based upon the director general's assurances that the lobsters had been exported in violation of Honduran law. Over the next few months, NMFS agents communicated with Honduran officials about the Honduran laws and the legality of the seized lobster shipment. In June of 1999 NMFS special agents and an attorney in the United States National Oceanic and Atmospheric Administration Office of the General Counsel met with various Honduran officials from the Secretaria de Agricultura y Ganaderia (SAG) in Tegucigalpa, Honduras. The minister, the vice minister, the director of legal services, the director of legal affairs, the secretary general of the SAG, the director general of the DIGEPESCA, and the legal advisor for the Servicio Nacional de Sanidad Agropecuaria (SENASA) [3] confirmed that the lobsters had been exported illegally without first being inspected and processed. Furthermore, the Honduran officials confirmed that there was a 5.5-inch size limit for lobster tails and that all catches had to be reported to Honduran authorities. The Honduran officials provided certified copies of the laws in question. In September of 1999 NMFS agents inspected the lobster shipment that had been seized earlier in the year. The inspection confirmed that the seized lobsters were packed in bulk plastic bags without being processed and revealed that a significant number had a tail length that was less than the 5.5

[3] Like the DIGEPESCA, the SENASA is an agency within the SAG. The SENASA is responsible for the enforcement of hygiene laws and regulations.

inches required by the Honduran size limit restriction. In addition, many of the lobsters were egg-bearing or had their eggs removed.

In March of 2000 two Honduran officials, a legal advisor in the Despacho Ministerial and a SAG legal advisor, traveled to Alabama to meet with government prosecutors and investigators. Both legal advisors provided written statements that cited Resolution 030-95 as a valid law regulating the lobster fishing industry. They also described the processing requirements mandated by Regulation 0008-93. [4] They further explained that Honduras prohibits the harvesting of egg-bearing lobsters. [5] Based upon the NMFS's investigation and the verification of the applicable foreign laws by the Honduran officials charged with regulating the lobster fishing industry, the government decided to prosecute the defendants for their roles in the illegal importing scheme. Subsequently, the grand jury returned a forty-seven-count second superseding indictment in September of 2000. [6]

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[4] Processing lobster tails involves several steps: thawing, sorting, and grading the lobsters by quality and size; placing the tails in individual plastic sleeves; and packing them in boxes.

[5] The legal advisors cited Resolution 003-80 as authority for the prohibition against harvesting or destroying egg-bearing lobsters. Resolution 003-80 is substantially similar to Article 70(3) of the Fishing Law, as both laws prohibit the harvesting or destruction of lobster eggs. At the foreign law hearing, the government acknowledged that it could not verify the publication of Resolution 003-80 in La Gaceta and therefore relied upon Article 70(3) as a Lacey Act predicate.

[6] Although the investigation focused initially upon the seized shipment referenced in the facsimile, the indictment charged the defendants with violations based upon numerous shipments of lobsters between 1996 and 1999.

To determine the validity of the relevant Honduran laws, the district court conducted a pretrial hearing on foreign law in September of 2000. Most of the defendants' evidence at the hearing pertained to the validity of Resolution 030-95, which established a 5.5-inch size limit for lobsters.[7] At the government's request, the minister of the SAG sent Secretary General Liliana Patricia Paz, the SAG's highest-ranking legal official, to testify at the foreign law hearing. Secretary General Paz testified as to the validity of various laws and confirmed that Resolution 030-95, Regulation 0008-93, and Article 70(3) of the Fishing Law [8] were in effect and legally binding during the time period covered by the indictment. She also explained the means by which a Honduran citizen may seek the invalidation of a resolution in Honduras,[9] and she testified that no such proceeding regarding Resolution 030-95 had been initiated at that time. Persuaded by the testimony of Secretary General Paz, the district court found that the government met its burden of establishing the validity of the Honduran laws that served as the predicates

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[7] Two law professors, both experts in Honduran law, testified for the defendants. The defendants also submitted a number of legal opinions from members of the Honduran legal community, including the attorney general of Honduras and the regional prosecutor of the Fiscalia Especial Para la Defensa de la Constitucion, and a declaration from a practicing Honduran attorney.

[8] The Fishing Law is a comprehensive statute regulating the Honduran fishing industry. *See* Decreto No. 154, May 19, 1959, La Gaceta, June 9, 1959.

[9] The Honduran judicial system includes a separate administrative law court system in which disputes relating to administrative matters are adjudicated. Among the procedures available in the administrative court system is an action by a Honduran citizen who claims to be affected adversely by some administrative rule to seek a declaration that the rule is invalid. Such an action is first brought in the Honduran Court of the First Instance of Administrative Law. Decisions from that court may be appealed to the Honduran Court of Appeals for Administrative Law.

for the Lacey Act charges. Shortly after the foreign law hearing, a jury trial was conducted, and the defendants were found guilty on multiple counts.[10]

After the trial, the defendants filed a number of motions seeking to have their convictions overturned.[11] In the motions, they attacked the validity of the foreign laws underlying their convictions, citing recent developments in Honduran law. In preparation for a hearing on the motions, an official from the United States Department of Justice and agents from the NMFS and the Federal Bureau of Investigation traveled to Honduras in early August of 2001 to discuss the defendants' challenges to the validity of the Honduran laws. They received affidavits from three Honduran government officials, including Secretary General Paz, confirming the validity of the laws the defendants were challenging. They also received an affidavit from the minister of the SAG, stating that those Honduran government officials were authorized to provide advice on the enforcement and validity of the laws. After the hearing, the district court dismissed each of the defendants' posttrial motions. Thereafter, in August of 2001, the district court sentenced McNab, Blandford, and Schoenwetter to ninety-seven months of imprisonment and Huang to twenty-four months of imprisonment.

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[10] McNab was found guilty of conspiracy, smuggling, and money laundering. Blandford was found guilty of conspiracy, smuggling, Lacey Act violations, and money laundering, as well as two lesser included offenses under the Lacey Act. Schoenwetter was found guilty as charged for conspiracy and smuggling, and Huang was found guilty as charged for conspiracy, Lacey Act violations, and false labeling.

[11] The final set of motions included a motion to dismiss because the indictment failed to charge a crime, a motion for a new trial based upon newly discovered evidence, and a motion for redetermination of foreign law based upon developments in Honduran law.

After sentencing, the defendants appealed their convictions based, in part, upon their contention that the Honduran laws used as the predicates for the Lacey Act convictions were invalid or void during the time period covered by the indictment.[12] In December of 2001 a government attorney and NMFS agents traveled to Honduras to discuss the defendants' new documents with Honduran officials to prepare the government's brief on appeal. Once again, the Honduran officials confirmed their prior statements regarding the validity of the Honduran laws.

Based upon our order, in January of 2002 McNab filed a Motion for Order Certifying Intention to Grant New Trial Upon Remand with the district court, which was subsequently adopted by Blandford, Schoenwetter, and Huang. After initially denying the motion, the district court granted the defendants' motion for reconsideration. Upon reconsideration, the district court affirmed its earlier order that it would not certify its intention to grant a new trial. The defendants appeal that order and argue that the district court erred in denying the motion to certify its intention to grant a new trial upon remand. In light of our holding regarding the validity of the Honduran laws, we need not address this issue.

The defendants raise a number of issues in these consolidated appeals. First, they argue that the scope of the Lacey Act is limited to foreign statutes and that the Honduran resolutions and regulations listed in the indictment were used improperly as predicates for their convictions. Second, they

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[12] After the initial notice of appeal, the defendants obtained additional support for their claim that the district court misinterpreted Honduran law. As a result, they filed a Motion for Judicial Notice, as well as alternative motions regarding newly issued Honduran legal opinions with this Court. We denied those motions without prejudice and held that the motions could be renewed if the district court refused to certify its intention to grant a new trial pursuant to *United States v. Ellsworth*, 814 F.2d 613 (*11th Cir. 1987*) (per curiam).

contend that the district court's interpretation of the Honduran resolutions and regulations was erroneous and that the Honduran laws that served as predicates for the convictions were invalid. Third, McNab argues that the district court abused its discretion by excluding evidence at trial relating to his "knowledge" of Honduran law. Fourth, the defendants assert that the district court made several errors with respect to the jury instructions. Fifth, they contend that the jury's verdicts were based upon insufficient evidence. Finally, Schoenwetter and Blandford argue that the district court erred in failing to postpone their sentencing and in determining the length of their sentences.

DISCUSSION

I. Scope of the Lacey Act

The first issue we address is whether the phrase "any foreign law" in the Lacey Act includes foreign regulations and other legally binding provisions that have the force and effect of law. The defendants argue that the phrase "any foreign law" should be read to mean foreign statutes and not foreign regulations or provisions that are legally binding. According to their argument, Resolution 030-95 and Regulation 0008-93 do not fall within the scope of the Lacey Act, because they are not statutes.[13] They rely upon what

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[13] The parties do not dispute the following explanation of the Honduran legal framework:

> The Government of Honduras is a constitutional republic. Its legal system is generally under the continental or civil law system . . . . [T]he Constitution is the supreme law of the Republic.
>
> The adoption of statutes in Honduras (issued as "Decrees") is the exclusive prerogative of the National Congress. At the same time, the Constitution . . . vests in the

they consider a distinction by Congress between "any law or regulation of any State" and "any foreign law." *16 U.S.C. § 3372(a)(2)(A)*. The defendants argue that by failing to include foreign regulations explicitly, Congress intended that only foreign statutes could serve as the basis for a foreign law Lacey Act violation.

Br. of Amicus Curiae of the Embassy of Honduras and the Asociacion de Pescadores del Caribe in Supp. of Def.-Appellant David Henson McNab at 8-9 (citations omitted).

In accordance with the plain meaning doctrine, "we begin our construction of . . . [the Lacey Act] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000)* (en banc), *cert. denied, 532 U.S. 1065, 150 L. Ed. 2d 208, 121 S. Ct. 2214 (2001)*; *United States v. Gilbert, 198 F.3d 1293, 1298 (11th Cir. 1999)*. It is well established that "[w]hen the words of a statute are unambiguous . . . [the] judicial inquiry is complete." *CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001)* (first alteration in original) (internal quotation marks omitted); *see also Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992)*

Executive Branch the exclusive authority to issue "Regulations[."] Regulations (issued in the form of "Acuerdos" - in English, "Accords" or "Decisions" or "Agreements") are general rules of conduct applicable to all who may be affected by them and they have the force of law. The Constitution provides that Regulations may be issued only by the President of the Republic with the co-signature of the Secretary of State. [sic] (*i.e.* Chief Minister) of the pertinent ministry. Both statutes and regulations become effective only when they are published in *La Gaceta*, which is the Honduran equivalent of the *Federal Register*.

("Courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). When, however, "the language is ambiguous or leads to absurd results, . . . [we] may consult the legislative history and discern the true intent of Congress. *United States v. Kattan-Kassin, 696 F.2d 893, 895 (11th Cir. 1983).*[14]

With this guidance in mind, we examine the language of the Lacey Act. The Lacey Act provides that "it is unlawful for any person . . . to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." *16 U.S.C. § 3372(a)(2)(A).* The Act defines "law" as those "*laws* . . . which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants." *16 U.S.C. § 3371(d)* (emphasis added).

Unfortunately, the statutory definition defines the word "law" by using the word "laws."[15] While the definition is helpful in determining what the "law" must regulate, it is silent as to whether "law" is restricted to statutes or includes regulations and other provisions that foreign governments use to promulgate legally binding rules. Thus, we turn first to the common usage or ordinary meaning of the word "law" to determine its plain meaning. *Cf. Consol. Bank, N.A. v. United*

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[14] We note that although a court may resort to extrinsic materials if the statutory language is ambiguous or if the interpretation causes absurd results, only the latter is a true exception to the plain meaning rule. *CBS Inc., 245 F.3d at 1227* ("Stating that ambiguity establishes an exception, instead of disestablishes the predicate for the rule, confuses things.").

[15] *Section 3371(d)* provides in full, "The terms 'law,' 'treaty,' 'regulation,' and 'Indian tribal law' mean laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants." *16 U.S.C. § 3371(d).*

States Dep't of the Treasury, 118 F.3d 1461, 1464 (11th Cir. 1997) ("In the absence of a statutory definition of a term, we look to the common usage of words for their meaning."). "[T]o determine the common usage or ordinary meaning of a term, courts often turn to dictionary definitions for guidance." *See CBS Inc., 245 F.3d at 1223.*

We read the word "law" to refer to laws "which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants," and the word "treaty" to refer to treaties "which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants," and so forth.

Merriam Webster's Collegiate Dictionary provides several definitions of law, including "a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority" and "the whole body of such customs, practices, or rules." *Merriam Webster's Collegiate Dictionary* 659 (Frederick C. Mish et al. eds., 10th ed. 1996). Under these broad definitions of the word "law," the phrase "any foreign law" incorporates the Honduran decrees and regulations at issue. *See United States v. 594,464 Pounds of Salmon, 871 F.2d 824, 826 (9th Cir. 1989).*

On the other hand, there are more narrow definitions of the word "law" that also are commonly used. *Black's Law Dictionary* provides several definitions of the word "law," including one that defines law simply as "[a] statute." *Black's Law Dictionary* 889 (Bryan A. Garner et al. eds., 7th ed. 1999). This definition is plausible when the phrase "any foreign law" is read in conjunction with the rest of *§ 3372(a)(2)(A).* For example, the defendants assert that "any foreign law" can refer only to foreign statutes, because to read "any foreign law" to include regulations would render

the word "regulation" in the earlier phrase "any law or regulation of any State" meaningless.[16]

While the defendants advocate this interpretation of the statute, it is not the only reasonable one. Another is that Congress intended to punish violations of state laws and state regulations and to punish violations of foreign laws, whatever form those foreign laws may take. The Ninth Circuit, in explaining why it interpreted "any foreign law" to cover different forms of foreign laws, emphasized how the world's diverse legal systems defy easy definition or categorization. It noted,

> Because of the wide range the forms of law may take given the world's many diverse legal and governmental systems, Congress would be hard-pressed to set forth a definition that would adequately encompass all of them. . . . Thus, if Congress had sought to define "any foreign law" with any kind of specificity whatsoever, it might have effectively immunized . . . [conduct] under the Act despite violation of conservation laws of a large portion of the world's regimes that possess systems of law and government that defy easy definition or categorization. It notes

594,464 Pounds of Salmon, 871 F.2d at 827-28. In other words, the argument is that Congress specifically chose to limit domestic law to statutes and regulations, but

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[16] "A basic premise of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant, or mere surplusage." *United States v. Canals-Jimenez, 943 F.2d 1284, 1287 (11th Cir. 1991).*

specifically chose to use the language "any foreign law" to cover the wide varieties of laws in foreign countries.

The net result is that there are several reasonable ways to interpret the word "law" in the phrase "any foreign law." As a result of this ambiguity, we look beyond the language of the statute to determine legislative intent. We thus now look to the legislative history of the Lacey Act to ascertain Congress's intent. *Fed. Reserve Bank of Atlanta v. Thomas, 220 F.3d 1235, 1239 (11th Cir. 2000).* "In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments whether accepted or rejected and the remarks in debate preceding passage." *Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080 (5th Cir. 1980).*[17]

The Lacey Act was introduced by Representative John F. Lacey of Iowa in 1900. H.R. Rep. No. 97-276, at 7 (1981) (discussing the enactment of the Lacey Act). Representative Lacey recognized that individual states were unable to protect their wildlife, because their laws did not reach into neighboring states. *Id.* Thus, he asserted that a federal law was necessary to outlaw the interstate traffic in wildlife illegally taken from their state of origin.[18] *Id.* By 1981 Congress recognized the need to strengthen the Lacey Act in response to "the massive illegal trade in fish, wildlife and plants." 127 Cong. Rec. 17,327 (1981) (remarks of Senator Lincoln Chafee). Congress thus amended the Lacey Act in

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[17] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)* (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[18] In 1935 the Lacey Act was amended to include foreign law because of concern over the illegal marketing of wildlife from other countries. H.R. Rep. No. 97-276, at 7.

1981 "to correct . . . insufficiencies" in the Act and "to simplify administration and enforcement."[19] S. Rep. No. 97-123, at 2 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1749.

Although there are certain parts of the legislative history of the Lacey Act that support the defendants' position to some extent, the legislative history reflects that "the [main] thrust of Congress's intention in amending the Act was to expand its scope and enhance its deterrence effect."[20] *594,464 Pounds of Salmon, 871 F.2d at 828.* Indeed, Congress clearly stated that the amendments were meant to strengthen the existing wildlife protection laws and to "provide [the government] the tools needed to effectively control the massive illegal trade in fish, wildlife and plants." 127 Cong. Rec. 17,327 (remarks of Senator Chafee); *see also* 127 Cong. Rec. 26,537 (1981) (remarks of Representative John Breaux). The Senate Report provided that the amendments "would allow the Federal Government to provide more adequate support for the full range of State, foreign and Federal laws that protect wildlife." S. Rep. No. 97-123, at 4. The amendments were intended to "raise both the civil and criminal penalties of the current laws and target commercial violators and international traffickers." 127

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[19] *The Lacey Act Amendments of 1981* combined the Lacey Act of 1900 and the *Black Bass Act of 1926.* 127 Cong. Rec. 26,537 (1981) (remarks of Representative John Breaux). The Black Bass Act was similar to the Lacey Act in that it prohibited the interstate transportation of fish taken in violation of state or foreign law. *See* 127 Cong. Rec. 17,329 (remarks of Senator Howard Baker).

[20] The defendants point to the fact that the pre-1981 Lacey Act prohibited trade in wildlife taken in violation of "any law or regulation of any State or foreign country," but that now the Lacey Act does not refer to foreign laws and regulations. "While the legislative history is not totally one-sided, the thrust of Congress's intention in amending the Act was to expand its scope and enhance its deterrence effect." *594,464 Pounds of Salmon, 871 F.2d at 828.*

Cong. Rec. 17,328 (remarks of Senator Chafee). By strengthening the penalty provisions of the Lacey Act, Congress intended "to give the Federal Government stronger enforcement tools to stop the large-scale importation and taking of fish . . . which enjoy protection under other foreign . . . laws." *Id.* at 17,329 (remarks of Senator James Strom Thurmond).

Our examination of the legislative history of the Lacey Act leads us to the conclusion that Congress by no means intended to limit the application of the Act by its adoption of the 1981 amendments. The defendants' interpretation is untenable, because it would restrict the application of the Lacey Act unduly and would thwart Congress's stated goal of strengthening the Act by amending it in 1981. *See id.* at 17,328 (remarks of Senator Chafee). Their narrow interpretation of the phrase "any foreign law" would prevent the wildlife conservation laws of many countries from serving as the basis for Lacey Act violations and would limit the Act's utility. We therefore conclude that regulations and other such legally binding provisions that foreign governments may promulgate to protect wildlife are encompassed by the phrase "any foreign law" in the Lacey Act.[21] *See United States v. Lee, 937 F.2d 1388, 1391-92 (9th*

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[21] The defendants also argue that because the Lacey Act is ambiguous as to the meaning of "any foreign law," the rule of lenity requires that any doubt be resolved in their favor. Lenity, however, is "reserved . . . for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." *Moskal v. United States, 498 U.S. 103, 108, 112 L. Ed. 2d 449, 111 S. Ct. 461 (1990)* (internal quotation marks omitted); *see also United States v. Curry, 902 F.2d 912, 915 (11th Cir. 1990).* As our examination of the legislative

Cir. 1991) (holding that a Taiwanese fishing regulation constituted "foreign law"); *594,464 Pounds of Salmon, 871 F.2d at 828* (holding the same).

As we have determined that the phrase "any foreign law" includes nonstatutory provisions such as Resolution 030-95 and Regulation 0008-93, we now turn to the defendants' argument that their convictions were based upon the district court's erroneous interpretation of foreign law.

II. Honduran Laws

The defendants contend that the Honduran laws that served as predicates for their convictions were invalid. Specifically, they argue that (1) Resolution 030-95, which established a 5.5-inch size limit for lobsters, never had the effect of law, because it was promulgated improperly and has been declared void by the Honduran courts; (2) Regulation 0008-93, which established inspection and processing requirements for the lobster fishing industry, was repealed in 1995, prior to the time period covered by the indictment; and (3) Article 70(3), which prohibits the harvesting and destruction of lobster eggs, was misinterpreted by the district court and was repealed retroactively in 2001.

As the defendants were found guilty of conspiracy under a general verdict, there is no way to know which Honduran law the jury relied upon in determining their guilt. Thus, if any of the three Honduran laws that the defendants challenge were invalid during the time period covered by the indictment, the defendants' convictions must be reversed.[22]

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history clarifies the purpose of and motivation behind the Lacey Act, the defendants' invocation of the rule of lenity fails.

[22] The government acknowledges that the rule stated above generally is true, but argues that the defendants are estopped from benefitting from that general rule because they "objected to a special verdict form and requested general

See Mills v. Maryland, 486 U.S. 367, 376, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988) (In criminal cases, "the [Supreme] Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict.").

We review a district court's interpretation of foreign law de novo. *United States v. Gecas, 120 F.3d 1419, 1424 (11th Cir. 1997)* (en banc). Our determination of foreign law is complicated by the posttrial shift in the Honduran government's position regarding the validity of the laws at issue in this case.[23] The Honduran government now maintains that the laws were invalid at the time of the lobster shipments or have been repealed retroactively. Thus, we must decide whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to follow the Honduran government's original position.

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verdicts." We disagree. The record indicates that the only objection to the special verdict forms was made by Blandford's attorney, who initially stated that he did not "like" the special interrogatories. Upon hearing the government's explanations for the special verdict forms, none of the defendants made any further objections. Thus, the district court declined to use the government's special verdict forms sua sponte, apparently because it considered them too complicated for the jury members to use in their deliberations.

[23] Despite the fact that Honduran officials supported the government throughout the investigation and trial of this case, the Embassy of Honduras filed an amicus curiae brief in support of McNab.

As we begin our analysis, we must make clear that the crux of this case is the validity of the Honduran laws during the time period covered by the indictment. Much of the defendants' arguments focus upon the fact that none of the laws are currently valid; however, their reliance upon the current invalidity of the laws is misplaced. "Although Lacey Act offenses are predicated upon violations of [foreign] law, the statute nowhere states that a viable or prosecutable [foreign] law violation is necessary to support federal charges. Instead, the Act simply requires that the fish or wildlife have been obtained in violation of any [foreign] law . . . ." *United States v. Borden, 10 F.3d 1058, 1062 (4th Cir. 1993)* (internal quotation marks omitted).[24] The reference to foreign law in the Lacey Act is there to define what constitutes illegal conduct. Thus, the subsequent invalidation of the underlying foreign laws does not make the defendants any less culpable for their actions. If the laws were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act by importing the lobsters in violation of those laws. Whatever changes in the laws occurred after the lobsters were imported into the

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[24] In *Borden*, two state statutes served as the predicates for the Lacey Act violations. *10 F.3d at 1062*. The defendant "contend[ed] that his indictment was invalid because the one-year statute of limitations for the predicate state offenses had expired by the time the indictment was returned." *Id.* He argued that the state statute of limitations governed Lacey Act violations, "because the existence of a *prosecutable* violation of state law was necessary to support a Lacey Act indictment." *Id.* The Fourth Circuit concluded that even though the Lacey Act "incorporates the substantive elements of state law," "it is not designed to incorporate state *procedural* law." *Id.* (internal quotation marks omitted). Thus, although the state statute of limitations had run on the state offense, the defendant's indictment still was valid.

United States illegally have no effect on the defendants' convictions.

In a Lacey Act prosecution, once the district court determines the validity of a foreign law during a given time period, it is up to the government to prove that the defendants knowingly violated those laws. *United States v. Todd, 735 F.2d 146, 151 (5th Cir. 1984).* The initial foreign law determination, however, is a question of law for the court. *See Fed. R. Crim. P. 26.1.* "The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *Id.* Among the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country. The district court, in the course of a Lacey Act prosecution, is entitled to rely upon such representations by foreign officials as to the validity of their government's laws. The court reasonably may assume that statements from foreign officials are a reliable and accurate source and may use such statements as a basis for its determination of the validity of foreign laws during a given time period.[25]

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[25] Although the amici suggest that the government used improper procedures, such as seeking out midlevel employees who were not authorized to render opinions on behalf of the Honduran government in its effort to ascertain the applicable Honduran laws, the record indicates quite the contrary. On February 9, 1999, an NMFS agent sent a formal request to the deputy director of the DIGEPESCA seeking information regarding the legality of the lobster referenced in the anonymous facsimile. The director general of the DIGEPESCA sent two letters to the NMFS in response to the inquiry. In his first letter, dated February 12, 1999, the director general described some of the Honduran laws

When, however, a foreign government changes its original position regarding the validity of its laws after a defendant has been convicted, our courts are not required to revise their prior determinations of foreign law solely upon the basis of the foreign government's new position. There must be some finality with representations of foreign law by foreign governments. Given the inevitable political changes that take place in foreign governments, if courts were required to maintain compliance with a foreign government's position, we would be caught up in the endless task of redetermining foreign law.

In this case, the government solicited and received the assistance of the SAG and the DIGEPESCA during the investigation of the legality of the lobster shipments. From the earliest stages of the investigation until after the defendants were convicted, the statements from the SAG were consistent with the government's understanding of the

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governing the lobster industry, including Resolution 030-95. In a second letter, dated February 25, 1999, the director general confirmed that the lobsters "had been illegally transported in violation of the Fishing Law, the Industrial and Hygienic Sanitary Inspection Regulation for Fish Products and Resolution No. 030-95" and included copies of the laws. The director general further stated the he supported all efforts "to legally prosecute natives or legalized Americans that violate the articles of the Lacey Act." The letter was copied to the minister and vice minister of the SAG. In addition, SAG Minister Guillermo Alvarado Downing confirmed in an affidavit that Secretary General Paz could "provide the necessary advice about and explanation of the enforcement and validity of Honduran laws, and especially the fisheries laws enforced by this Ministry." Thus, it is clear that the government conducted its investigation properly through the Honduran officials who were responsible for interpreting, enforcing, and applying the fishing laws of Honduras.

laws. After the defendants were convicted, however, certain events in Honduras induced the Honduran government to refute its original statements. The newly issued statements and opinions of Honduran officials, however, do not persuade us that the district court erred in its determination that the Honduran laws at issue were valid and enforced during the time period covered by the indictment.

By our decision today, we do not mean to impinge upon any foreign government's sovereignty. Honduras has every right to invalidate and repeal the laws at issue in this case. The district courts and the government of the United States, however, have the right to rely upon the Honduran government's original verifications of its laws. We must have consistency and reliability from foreign governments with respect to the validity of their laws. Otherwise, there never could be any assurance when undertaking a Lacey Act prosecution for violations of foreign law that a conviction will not be invalidated at some later date if the foreign government changes its laws. Acceptance of the Honduran government's current interpretation of its laws as determinative of the validity of the laws would set the foundation for future Lacey Act defendants to seek postconviction invalidation of the underlying foreign laws. Although such is not the case here, it is not difficult to imagine a Lacey Act defendant in the future, who has the means and connections in a foreign country, lobbying and prevailing upon that country's officials to invalidate a particular law serving as the basis for his conviction in the United States. Such a scenario would completely undermine the purpose of the Lacey Act. There would cease to be any reason to enforce the Lacey Act, at least with respect to foreign law violations, if every change of position by a foreign government as to the validity of its laws could invalidate a conviction.

Thus, we conclude that the postconviction shift in the Honduran government's position regarding the validity of its

laws is not determinative as to whether the laws were valid at the time the lobsters were imported into the United States. We now examine each law in turn to determine whether each was valid during the time period covered by the indictment.

Resolution 030-95

Resolution 030-95, the law establishing the 5.5-inch size limit for lobsters, provides for sanctions for noncompliance with its terms. *See* Resolucion No. 030-95, Dec. 5, 1995, La Gaceta, Jan. 4, 1996. The defendants argue that Resolution 030-95 never was a binding law,[26] because it was not issued in accordance with Honduran constitutional procedure.

Furthermore, throughout the investigation and after the trial, Honduran officials repeatedly confirmed that Resolution 030-95 was a valid and binding law. The director general of the DIGEPESCA confirmed the size limit requirement in three separate letters. Resolution 030-95 was cited by several Honduran officials as a valid and binding law during two trips to Honduras by NMFS agents, one before and one after the defendants' trial. Secretary General Paz testified as to the validity of Resolution 030-95 during the pretrial foreign law hearing. Thus, it is evident that

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[26] This argument is inconsistent with McNab's prior acknowledgment of the validity of the 5.5-inch size limit and his instructions to his lobster boat captains to abide by it. In a letter to his fishing boat captains, dated October 28, 1999, McNab advised that "[i]t is absolutely prohibited to capture lobsters under the size allowed by the Law and/or eggbearing lobsters. . . . You will only keep those lobsters measuring more than 5.5-inches." A second letter was sent to the fishing boat captains by the general manager of McNab's company on July 31, 2000. The captains were "reminded to comply with the sizes and weights that the lobster caught must fulfill, which is 5 1/2 inches."

Resolution 030-95 was considered binding by those responsible for its enforcement.

The basis for the defendants' argument that Resolution 030-95 never was a valid law is an opinion from the Honduran Court of the First Instance of Administrative Law.[27] In May of 2001 the Honduran administrative law court found that Resolution 030-95 had been promulgated through an incorrect procedure and ordered that the resolution was "entirely voided, *but this is only for purposes of [its] annulment and future inapplicability*: This Resolution does not confer any right to claims." R. at 5:324 Ex. B (emphasis added). Subsequently, the Honduran Court of Appeals for Administrative Law affirmed the lower court's decision invalidating Resolution 030-95. R. at 1 Supp.:415 Ex. C.

There are conflicting opinions from Honduran officials as to the effect of the court's annulment of Resolution 030-95 on the defendants' convictions.[28]

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[27] After the trial in the district court had begun, McNab filed a petition in the Honduran Court of the First Instance of Administrative Law, seeking to annul Resolution 030-95 on the grounds that the resolution had not been signed by the Honduran president before being issued and that it should have been issued as a decree rather than as a resolution.

[28] The affidavit of the assistant attorney general of Honduras indicates that the decision annulling Resolution 030-95 does not apply retroactively and does not legalize the shipments of undersized lobsters retroactively. The attorney general of Honduras, however, offers an alternative explanation for the prospective language in the court's decision that favors the defendants. He contends that Resolution 030-95 was annulled ab initio, that it never was a valid law and, therefore, cannot serve as a basis for the defendants' convictions. Although the dissent accepts his explanation that

While we certainly respect the opinions of the Honduran officials, we base our determination that Resolution 030-95 was valid during the time period covered by the indictment upon the Honduran court's opinion. The Honduran court clearly stated that Resolution 030-95 was annulled for prospective application only, and we assume that the Honduran court meant what it said. Although we recognize that Resolution 030-95 is now invalid, we see nothing in the Honduran court's opinion to indicate that the nullification should be applied retroactively.[29] In fact, the decision

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Resolution 030-95 never was binding and that the prospective language merely protects the Honduran government from civil liability, we believe that the attorney general is extracting meaning from the Honduran court's decision that is not supported by the language of the opinion. In addition, although a report from the Honduran national human rights commissioner advised that Secretary General Paz's testimony be disqualified as legal error and that Resolution 030-95 be declared void retroactively, a subsequent meeting between the commissioner and an NMFS agent revealed that the commissioner was unaware of the factual background of the prosecution at the time he rendered his report. Furthermore, the commissioner said that he felt "pressured" by McNab's representatives to issue a quick decision.

[29] We note that with the permission and approval of the minister of the SAG, both Secretary General Paz and SAG Legal Advisor Jose Bernardo Torres Umanzor confirmed that the Honduran government continued to enforce Resolution 030-95 as a valid and binding law while the appeal was pending before the Honduran Court of Appeals for Administrative Law. They also explained that any annulment of Resolution 030-95 would not be retroactive, because the Honduran court's judgment pertained to an administrative matter, not a criminal matter.

mandates prospective application.[30] Thus, Resolution 030-95 is a valid predicate for the defendants' convictions.[31]

McNab points to the statement of SAG Minister Downing to support his assertion that aside from Article 96 of the Honduran Constitution, the Honduran appellate court's decision mandates retroactivity. Downing bases his opinion that the invalidation applies retroactively upon an inexplicable assertion that the Honduran appellate court's opinion "expands" the Honduran Court of the First Instance of Administrative Law's opinion and somehow mandates retroactivity. We, however, find nothing in the Honduran

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[30] We briefly address the defendants' argument that the Honduran Constitution requires that the invalidation of Resolution 030-95 be applied retroactively in this case. Article 96 of the Honduran Constitution provides, "The Law does not have retroactive effect, except in penal matters when the new law favors the delinquent or the person that is prosecuted." Constitucion de la Republica de Honduras art. 96. Article 96, however, has no application in this case. The reason that we look to foreign law in Lacey Act prosecutions is to determine what constitutes illegal conduct. At the time of the defendants' conduct, harvesting lobsters under 5.5 inches was a violation of Resolution 030-95. The fact that Honduras now may not hold the defendants liable for past shipments that contained undersized lobsters does not change the fact that those shipments violated then-valid Honduran laws and the Lacey Act.

[31] The dissent concedes that reversal of the defendants' convictions is not required if the invalidation applies prospectively. Further, the dissent concedes that "the language of the Honduran Court could be construed to mean prospective application only." We conclude that the language of the Honduran court opinions requires prospective application only and that nothing else in the record mandates otherwise.

appellate court's decision requiring retroactivity, because the Honduran appellate court issued a summary affirmance.

The government's evidence, both pretrial and posttrial, indicates that because the Honduran court's judgment about Resolution 030-95 involved an administrative matter and not a criminal matter it has no retroactive effect. Although McNab's evidence, submitted postconviction, may indicate a contrary view, it is clear that a consensus has not been reached on this issue in Honduras. Nevertheless, we still must determine the best reading of the laws. *See United States v. Mitchell, 985 F.2d 1275, 1281 (4th Cir. 1993)* ("Perhaps, as is the case with many of our own laws, a consensus has not yet been reached in Pakistan. Yet we are charged with determining the best reading of the laws.").

In our judgment, the government's evidence and a plain language reading of Article 96 require us to find that Article 96 does not apply in this case and that the invalidation of Resolution 030-95 applies prospectively. Article 96 expressly provides that "the Law does not have retroactive effect." This is consistent with the Honduran court's judgment that the invalidation of Resolution 030-95 be applied prospectively. The only exception under Article 96 is a "new law" in criminal matters.

McNab's view requires a finding that "[t]he Law" in Article 96 applies to judicial declarations of the invalidity of an existing law as opposed to the enactment or promulgation of a "new law." The language of Article 96 does not support this view. In the second clause of the sentence, Article 96 specifically refers to a "new law" that favors the accused. It does not refer to the absence of a law or a declaration that a law is invalid.

Regulation 0008-93 was issued pursuant to Decree 40 and required that lobsters be inspected and processed in Honduras prior to exportation. *See* Acuerdo No. 0008-93, Jan. 13, 1993, La Gaceta, Apr. 7, 1993. In January of 1995

the Congreso Nacional enacted Decree 157-94, which repealed and replaced several existing statutes, including Decree 40. *See* Decreto No. 157-94, Nov. 15, 1994, La Gaceta, Jan. 13, 1995. In December of 1999 the Secretaria de Recursos Naturales y Ambiente issued Accord 1081-99, an administrative regulation that contained updated inspection and processing requirements and expressly repealed Regulation 0008-93. *See* Acuerdo No. 1081-99, Sept. 23, 1999, La Gaceta, Dec. 2, 1999.

On the basis of their posttrial research, the defendants argue that Regulation 0008-93 was repealed along with Decree 40 in 1995.[32] They contend that the repeal of Decree 40 operated to repeal the regulations promulgated under it, including Regulation 0008-93. The defendants argue that the automatic repeal of regulations triggered by the repeal of the statute under which those regulations were promulgated is a longstanding principle of Honduran law, and they rely upon a recent interpretive decree by the Congreso Nacional for support. *See* Decreto No. 198-2001, Nov. 1, 2001. That decree expressly provides that "the express total or partial repeal of a law leaves without legal value or effect the general regulations and the specific regulations totally . . .

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[32]The defendants also raise a second challenge with respect to the propriety of Regulation 0008-93 as a Lacey Act predicate. They argue that even if Regulation 0008-93 were not repealed until 1999 it falls outside the scope of the Lacey Act, because it is not a law regulating the taking, possessing, transportation, or sale of wildlife. We disagree. When Congress amended the Lacey Act in 1981, it expressly stated that the Act covers laws "relating or referring to fish or wildlife or plants." S. Rep. No. 97-123, at 5; *see also United States v. Lewis, 240 F.3d 866, 869 (10th Cir. 2001)* (per curiam); *Lee, 937 F.2d at 1392*. Accordingly, our review of the regulation confirms that it unquestionably relates to fish and is within the scope of the Lacey Act.

that the Executive Branch through the respective Secretariat of State has issued to implement the provisions of the repealed Law . . . ." *Id.*

We are unconvinced by the defendants' argument for two reasons. First, we question why there is a need to issue an interpretive decree if the concept of an automatic repeal of regulations is such a longstanding principle of Honduran law.[33] Second, Regulation 0008-93 was repealed *expressly* by the Secretaria de Recursos Naturales y Ambiente in 1999 when it issued new rules for lobster fishing. There would be no need to repeal Regulation 0008-93 expressly in 1999 if it was repealed automatically in 1995.

Furthermore, the Honduran Civil Code provides support for the proposition that Regulation 0008-93 remained in effect until the express repeal in 1999.[34] According to the

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[33] The evidence in the record contradicts this assertion and establishes that the Honduran government regarded the hygiene regulation as valid between the time of the 1995 repeal of Decree 40 and the 1999 express repeal of Regulation 0008-93. The March of 2000 statements by the Honduran legal advisors described the processing requirements mandated by Regulation 0008-93 *and* Decree 157-94, the very same decree that the defendants contend repealed Regulation 0008-93 in 1995. At the pretrial foreign law hearing, the SAG's Secretary General Paz testified as to the validity of the processing and inspection requirements. Secretary General Paz stated that Regulation 0008-93 continued to be enforced in Honduras, because it was only tacitly repealed in 1995.

[34] Not only does the Honduran Civil Code support the district court's determination that Regulation 0008-93 was valid during the time period covered by the indictment, the defendants' interpretation leads to an illogical result. An automatic repeal of Regulation 0008-93 in 1995 would have

Civil Code, a law may be repealed totally or partially by another law. Codigo Civil art. 42. Such a repeal may be express or tacit; it is express when the new law expressly provides that it repeals the previous one, and it is tacit when the new law's provisions cannot be reconciled with the previous law. Codigo Civil art. 43. Significantly, a "tacit repeal leaves in effect in the previous law anything not in conflict with the provisions of the new law, even though both versions may cover the same matters." Codigo Civil art. 44. The 1995 decree did not repeal Regulation 0008-93 expressly, which means that any repeal of the regulation was tacit. As Regulation 0008-93 did not conflict with the 1995 decree, it remained in effect until the 1999 regulation expressly repealed it. Thus, the district court properly determined that Regulation 0008-93 was valid during the time period covered by the indictment.

Article 70(3)

Article 70(3) of the Fishing Law prohibits the harvesting or destruction of lobster eggs. *See* Decreto No. 154, May 19, 1959, La Gaceta, June 17, 1959. The defendants argue that Article 70(3) does not prohibit the destruction or collection of lobster eggs for profit. They contend that the district court's interpretation that the law prohibited the harvesting of the egg-bearing species themselves was erroneous.[35]

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created a four-year window during which there were no sanitary regulations for lobster fishing. This would have been an odd result considering that the 1995 decree issued by the Congreso Nacional was intended to strengthen the hygiene requirements.

[35] Lobsters have swimming legs on their abdomens called swimmerets, which female lobsters use to hold eggs. 7 *The New Encyclopedia Britannica* 430 (15th ed. 1998). The swimmerets of some of the lobsters in the seized shipment were clipped off and the eggs were removed.

We fail to see how Article 70(3) can be read other than to prohibit the destruction or harvesting of the eggs of lobsters for profit. The destruction of eggs to sell the female lobsters appears to be a clear violation of Article 70(3), which provides for punishment by fine or imprisonment to "[t]hose who destroy or harvest the eggs, or the offspring of fish, chelonians or other aquatic species for profit." *Id.* The defendants' argument regarding the legality of capturing egg-bearing lobsters is contrary to the plain language of Article 70(3).[36]

The defendants also argue that Article 70(3) was repealed retroactively in February of 2001 by the enactment of Decree 245-2000 by the Congreso Nacional. As stated above, our duty with respect to each of the Honduran laws is to determine whether they were valid during the time period covered by the indictment. Whether the 2001 amendment to Article 70(3) repealed the prohibition against harvesting egg-bearing lobsters for profit is not our concern. Thus, we reject the defendants' argument that Article 96 of the Honduran Constitution requires that we apply the 2001 amendment retroactively for the reasons stated with respect to Resolution

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[36] Not only is their interpretation contrary to the plain language of Article 70(3), it directly conflicts with McNab's own instructions to his boat captains that harvesting egg-bearing lobsters was prohibited. The October 1999 letter from McNab to his fishing boat captains provided that "[i]t is absolutely prohibited to cut the pleopods of the Lobsters to remove any eggs . . . . All the lobsters with eggs will be returned to the sea without any exception. For that purpose, you will have to instruct the fisherman who work in the boats on how to identify them." The letter from McNab's general manager to the captains in July of 2000 instructed that they may "not capture lobsters that are in their reproductive phase or gravid lobsters (with eggs). It is absolutely prohibited to remove egg sacs from the lobster to remove its eggs . . . ."

030-95. Accordingly, we conclude that Article 70(3) was a proper predicate for the defendants' convictions.

Thus, the defendants' newfound support from the Honduran government does not change the fact that during the time period covered by the indictment, the laws at issue were valid. Although we certainly respect the Honduran government's position, the recent developments since the trial and the newly rendered opinions from Honduran officials cannot turn what were illegal lobster shipments into legal lobster shipments retroactively.

Having determined that Resolution 030-95, Regulation 0008-93, and Article 70(3) were valid during the time period covered by the indictment and thus were proper predicates for the Lacey Act charges, we now briefly address the defendants' remaining issues on appeal. The defendants argue that (1) the district court abused its discretion by excluding evidence at trial relating to McNab's "knowledge" of Honduran law; (2) the district court made several errors with respect to the jury instructions; (3) there was insufficient evidence to support the jury's verdicts; and (4) the district court erred in failing to postpone Schoenwetter and Blandford's sentencing and in determining the length of their sentences. After thoroughly reviewing the record, we find that these issues are without merit.

CONCLUSION

Thus, we conclude that the Honduran laws used as the underlying predicates for the defendants' convictions fall within the scope of the Lacey Act and were valid and legally binding during the time period covered by the indictment. The remaining issues raised by the defendants were decided properly by the district court or are without merit. We therefore AFFIRM the defendants' convictions and sentences.

DISSENTBY: FAY, FAY

DISSENT: FAY, Circuit Judge, dissenting:

The majority opinion is both thorough and scholarly in dealing with this complicated matter. With some hesitation, I most respectfully dissent from that portion of the majority opinion upholding the validity of Honduran Resolution 030-95. The theme of the majority opinion is that the government of Honduras has "shifted" its position. The question for determination is phrased as being complicated by the changed or new position of the Honduran government. The majority then decides this issue within the framework of whether or not we are free to follow the Honduran government's original position.

Try as I might, I simply cannot read this record that way. There was never unanimity nor agreement concerning the validity of Resolution 030-95. That question was hotly contested. But, throughout the course of this litigation, the resolution of that question was based upon the weight given by the trial judge to the evidence presented by the U.S. government during a pretrial hearing on foreign law. At that time, the Honduran courts had not ruled. Now they have.

It should come as no surprise to anyone that some of the "expert" witnesses were correct and some were wrong. Nor should we be surprised that it was the courts of Honduras which ultimately answered the question. That is the way it works in Honduras and in the United States of America. Simply stated, it is my position that we are bound by the rulings of the Honduran courts declaring Resolution 030-95 null and void. This being the case, the defendants convictions must be reversed since one of the Honduran laws relied upon by the jury in finding guilt has now been found to be a nullity.

Most respectfully, I disagree with the majority's conclusion that the government of Honduras has changed its position. Government officials testified on both sides of the

issue before the district court. There was no one official voice for the government of Honduras. But, there is now. The Honduran courts have ruled and the Honduran Embassy has filed an *amicus* brief advising us of the Honduran government's position -Resolution 030-95 is null and void and was so during the critical time charged in the second superceding indictment. That is the only official government position I am aware of in this record.

We all agree that the key component to any alleged *Lacey Act § 3372(a)(2)(A)* violation is the commission of a predicate State or Foreign offense concerning fish or wildlife. We further agree that, for purposes of these appeals, three predicate offenses are pertinent. Of those three, my concern goes to Resolution 030-95 concerning the minimum legal size of harvested lobster tails.

As the majority correctly notes, the district court properly conducted a foreign law hearing to determine whether Resolution 030-95 was, in fact, a valid Honduran law during the time period charged in the second superseding indictment. Over the testimony of an expert in Honduran law, a Honduran law professor and former Ministry of Justice, the then Attorney-General of the Republic of Honduras, the Honduras Bar Association and others, the District Court, based upon the testimony of one lower-level Honduran government official, Liliana Paz, Secretary General of the Ministry of Agriculture and Livestock, concluded that Resolution 030-95 was a valid law.

Following trial and conviction, defendant David Hensen McNab ("McNab") challenged the validity of Resolution 030-95 in the Court of First Instance of Administrative Law in Honduras ("Honduran Court"). That challenge was opposed by an attorney representing the government of Honduras. At the conclusion of that proceeding, the Honduran Court declared Resolution 030-95 to be null and

void. Specifically, on May 23, 2001, the Honduran Court found:

> First: . . . [Resolution 030-95] [does] not conform to law by virtue of having violated the legal code at the time [it] [was] issued. Second: the challenged [Resolution] . . ., No. 030-95 of December 5, 1995, [is] entirely voided, but this is only for purposes of [its] annulment and future inapplicability: This Resolution does not confer any right to claims.

R. at 5:324 Ex. B. The Honduran Court premised its decision on the fact that Resolution 030-95 was not properly issued by the President of the Republic of Honduras and authorized by the proper Secretary or Under Secretary of State as is required under Honduran law. Subsequently, the government of Honduras appealed the Honduran Court's ruling to the Court of Appeals of Administrative Matters ("Honduran Court of Appeals") which on October 11, 2001, confirmed the correctness of the Honduran Court's decision.

The rulings of the Honduran courts do raise a second question as to whether or not the ruling applies retroactively. As quoted above, the language of the Honduran Court could be construed to mean prospective application only. That is the position the majority takes in this case. Therefore, the critical question before this court is whether or not Resolution 030-95 was valid at the time of the defendants' conduct as charged in the second superceding indictment. This question is determined by whether the invalidation of Resolution 030-95 is to be applied retroactively or prospectively. If the invalidation of Resolution 030-95 is to be applied retroactively, it seems to me that reversal of the defendants' convictions is mandated. If invalidation is to be only applied prospectively, reversal is not required.

We all agree that we review a district court's interpretation of foreign law *de novo*. *United States v. Gecas*,

120 F.3d 1419, 1424 (11th Cir. 1997) (en banc). We also agree that under certain circumstances an underlying Lacey Act predicate offense need not be independently prosecutable. *See United States v. Borden, 10 F.3d 1058 (4th Cir. 1993)* (affirming Lacey Act conviction where the enforcement of underlying predicate state law was barred by applicable state statute of limitations but not by federal statute of limitations). However, *Borden*, or any similar case, is fundamentally different than this case where the predicate substantive criminal law supporting the Lacey Act convictions cannot be enforced, not because of a procedural bar, but because the law itself has been invalidated by the courts through nullification. In other words, what was thought to be a crime turns out to not be a crime under Honduran law. It bears noting that had U.S. law been implicated, reversal of the convictions would not be in question and the case would easily be resolved in the defendants' favor. In the United States, where a substantive criminal law is subsequently declared to be invalid by the courts, any convictions thereon would be reversed.

Further troubling is the fact that as a matter of Honduran constitutional law, these defendants could not be tried and convicted for violation of Resolution 030-95 in Honduras. In Honduras, as in the United States, any criminally enforceable statute later declared to be invalid by the courts is retroactively applied to any criminal defendant. Article 96 of the Honduran Constitution specifically provides, "the Law does not have retroactive effect, except in penal matters when the new law favors the delinquent [(i.e., criminally convicted)] or the person that is prosecuted." Constitucion de la Republica de Honduras art. 96.

The majority makes note of Article 96 but simply asserts its inapplicability by concluding that "at the of time the defendants' conduct, harvesting lobsters under 5.5 inches was a violation of Resolution 030-95." As stated above, if the invalidation of Resolution 030-95 is retroactively applied, as

I believe it must be, then at the time of the defendants' conduct, there would not have been a violation of Resolution 030-95. To this point, there are authorities in the record which I find particularly relevant in deciding whether the Honduran Court's invalidation of Resolution 030-95 should be retroactively applied.

We start with the official voice of Honduras in the United States. The country of Honduras, through its Embassy in Washington, D.C., has filed an *amicus* brief stating unequivocally that retroactive application is the law of Honduras. The current Attorney General of the Republic of Honduras, Sergio Zavala Leiva, the National Human Rights Commissioner of the Republic of Honduras, Leo Valladares Lanza, [1] the current Secretary of State of the Offices of Agriculture and Livestock, Guillermo Alvarado Downing and Secretary Downing's subordinate and star U.S. government witness before the district court, Secretary General of the Ministry of Agriculture and Livestock, Liliana Paz, all support the position that retroactive application is required. The only witness presented suggesting that retroactive application is not required is Juan Arnaldo Hernandez Espinoza, an Assistant Prosecutor General of the Public Ministry of the Republic of Honduras.[2] Thus, the

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[1] Although his opinion was never altered, amended or changed in any manner, the majority notes that a National Marine and Fisheries Service agent who interviewed Commissioner Lanza indicated that Commissioner Lanza revealed that he felt "'pressured' by McNab's representatives to issue a quick decision."

[2] In his opinion, Assistant Attorney General Espinoza ("Espinoza") indicates that there is no retroactive application of the invalidation of Resolution 030-95 because "the sanction to which [the defendants'] conduct applies is based on a measure that originates in the Fishing Law and not in the activity of the Executive Branch." Appellee's Addendum of Foreign Law Materials at tab 1. Upon closer examination, it becomes clear that Espinoza's opinion is premised on the assumption that the Fishing Law, not Resolution 030-95, defines the minimum lobster harvest size. Therefore, invalidation of Resolution 030-95, a resolution

overwhelming evidence before this court is squarely on the side of the retroactive application of the invalidation of Resolution 030-95. I can come to no other conclusion.

As to the appropriate interpretation of the Honduran Court's use of the terms "annulment" and "future inapplicability," Attorney General Leiva provides the most reasoned and reasonable explanation. Attorney General Leiva explains:

> The reason that the laws of Honduras and, in particular, the Court of Administrative Appeals, with its specific language in its judgment, only set forth its future inapplicability is to guarantee the legal security of the State, protecting it from damages and losses that could have been caused by the enforcement of an act that is null and void as a matter of law.
>
> (Leiva Decl. P 8)

Apparently, in Honduras the government may be subject to civil liability for the enforcement of a subsequently declared invalid law. Therefore, in the context of Honduran law, the Honduran Court's language makes sense and simply seeks to limit the government's liability and protect its treasury. The precise language of the Honduran Court supports this interpretation. Following the use of "annulment" and "future inapplicability" is a colon followed by the following illuminating language, "this Resolution does

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implemented pursuant to the authority of the Fishing Law, is without import and the question of retroactivity is rendered irrelevant. This opinion is mistaken for two critical reasons. Firstly, Espinoza's opinion ignores the fact that, for purposes of U.S. law, the predicate act the defendants were charged with violating is Resolution 030-95, not the Fishing Law. Secondly, Espinoza's opinion ignores the fact that, with regard to minimum lobster harvest size, the Fishing Law is silent and directs such restrictions to be fashioned pursuant to regulation. *See* Decreto No. 154, May 19, 1959, La Gaceta, June 9, 1959, art. 70.

not confer any right to claims." Thus, Attorney General Leiva's explanation, as compared to the other evidence before the court, is most compelling. Furthermore, this court should not interpret Honduran law in a vacuum. As stated above, in Honduras, Article 96 of the Honduran Constitution retroactively applies the invalidation of Resolution 030-95 to any criminal defendant. The Honduran Court certainly would have been aware of the existence and effect of Article 96 when crafting the language and scope of its opinion and this court should seek to interpret the Honduran Court's opinion in its proper context.

The majority advances the important principle of finality in support of its decision. As a general proposition, I agree that finality is an important aspect of American jurisprudence. However, in the context of an invalidated substantive criminal law which forms the basis of a criminal prosecution or conviction, reliance on the concept of finality is misplaced. As stated above, under both U.S. and Honduran law, retroactive application is warranted for a criminal defendant charged or convicted of a subsequently declared invalid criminal statute. *Cf., Davis v. United States, 417 U.S. 333, 346, 94 S. Ct. 2298, 2305, 41 L. Ed. 2d 109, 119 (1974)* (in the context of a petition for relief pursuant to *28 U.S.C. § 2255*, concluding that if conviction and punishment are for an act not made criminal by the law, "[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice . . . ." (Internal quotations omitted)).

For emphasis, I repeat again that the majority opinion discusses extensively and is strongly critical of the changed position or shift by the Honduran government. While that terminology may give comfort to the majority, it is simply

not accurate. While various government officials gave conflicting opinions regarding the validity of Resolution 030-95, this was before the Honduran courts ruled. The Honduran

courts have now ruled and both agree, Resolution 030-95 was null and void. The majority casts this in an unfavorable light akin to something sinister. In my opinion, this is no different than what occurs routinely in our country. Attorneys, and even the Attorney General of a state or the United States, often express opinions about statutes only to find that after a court challenge, they were wrong. That is all that happened here. Some of the experts were right; some were wrong. But, the Honduran courts have now spoken and there is simply no doubt that Resolution 030-95 is null and void as if it never existed.

To suggest that the newly issued statements and opinions of Honduran officials do not carry the weight of the earlier statements is a strange position for members of the judiciary. The so-called "shift in position" is the result of lawful litigation within the courts of a foreign nation. I think we would be shocked should the tables be reversed and a foreign nation simply ignored one of our court rulings because it caused some frustration or inconvenience.

The evidence in this case supports the conclusion that the defendants were guilty of knowingly violating the law at the time they harvested, shipped and sold these "shorts." The prosecutors did their very best to establish the law of Honduras which is essential under the Lacey Act. It is easy to understand the frustration inherent in this present situation. But, the Lacey Act, by its very terms, is dependent upon the laws of a foreign sovereign. In this situation, we do not control the outcome of challenges made to those underlying laws. No one has suggested that McNab was not exercising his lawful rights as a citizen of Honduras or that the courts of Honduras were without authority to issue the decisions they did.

Most reluctantly, I therefore dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF
AMERICA

v. CRIMINAL ACTION
NO. 1:00-00079-(1, 2, 3 & 4)-RV

DAVID HENSON
MCNAB, ROBERT D.
BLANDFORD,
ABNER
SCHOENWETTER,
DIANA H. HUANG

ORDER

This matter is before the court on the following documents:

1. "Motion for Pretrial Determination of Foreign and State Law Pursuant to Fed. R. Crim. P. 12(b) and 26.1 and Memorandum in Support Thereof," (doc. 46), together with evidentiary materials, (in redwell), filed by the government;

2. "Motion to Dismiss Counts One through Twelve and Counts Twenty-Eight Through Forty-Three of the

Indictment," (doc. 53), filed by defendant David Henson McNab:[37]

3. "Opposition To Defendant McNab's Motion to Dismiss Counts One Through Twelve and Counts Twenty-Eight Through Forty-Three of the Indictment," (doc. 87), filed by the government;

4. "Supplement/Amendment to . . . Motion for Pretrial Determination of Foreign and State Law and Memorandum in Support Thereof," (doc. 100), filed by the government;

5. "Notice of Intent to Offer in Evidence Foreign Records," (doc. 105), filed by the government;

6. "Response to the Government's Motion for Pretrial Determination of Foreign and State Law," (doc. 110), filed by defendant McNab;

7. "Renewed Motion for Evidentiary Hearing on Government's Motion for Determination of Foreign Law" (doc. 113), filed by defendant McNab;

8. "Opposition to Pretrial Determination of Foreign and State Law," (doc. 115), together with a supporting brief, (doc. 116), filed by defendant Robert D. Blandford;

9. "Notice of Intent to Offer in Evidence Foreign Records," (doc. 117), filed by defendant McNab;

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[37] The motion to dismiss is premised on multiple grounds, including the contention that "the transactions are not violative of any valid law, treaty, or regulation in Honduras." Mot. To Dism., ¶ 2.

10. "Reply to Defendant [McNab's] Response to Motion for Pretrial Determination for Foreign and State Law," (doc. 122), filed by the government;

11. "Notice of Intent to Offer in Evidence Foreign Records," (doc. 125), filed by the government;

12. "Motion to Dismiss the Superseding Indictment," (doc. 151), filed by defendant McNab,

13. "Brief in Support of ... Response to the Government's Motion for Pretrial Determination of Foreign and State Law and In Support of ... Motion to Dismiss the Superseding Indictment," (doc. 178), filed by defendant McNab;

14. "Summary Brief on Pretrial Determination of Foreign and State Law," (doc. 182), filed by the government;

15. "Summary of Significant Evidence Supporting its Position Regarding the Determination of Foreign Law," (doc. 185), filed by the government;

16. "Supplemental Opposition to Government's Motion for Determination of Foreign Law and In Support of Defendant McNab's Motion to Dismiss," (doc. 186). filed by defendant McNab:

17. "Notice of Filing of Expert Supplementary Affidavit," (doc. 194), filed by defendant McNab;

18. "Supplemental Brief Regarding Foreign Law Issue," (doc. 199), filed by defendant McNab; and

19. All exhibits admitted during the September 27-29, 2000 hearing.

INTRODUCTION

In this criminal proceeding, defendants are charged with, *inter alia*, conspiring to violate and/or violating the Lacey Act, 16 U.S.C. § 3371 *et seq.* *Inter alia*, the Lacey Act makes it unlawful "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish . . . taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." 16 U.S.C. § 3372(2)(A). In this case, the government contends that defendants violated Honduran law in various ways when they imported or conspired to import spiny lobster tails and shrimp on multiple occasions over a five-year period.[38] So that the

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[38] The second superseding indictment also charges that some of the defendants violated the Lacey Act by importing shrimp and spiny lobsters in violation of Florida law, and the government has requested the court to "determine" the relevant Florida law. As stated on the record during the September 27-29 hearing, none of the parties contest the validity or scope of the applicable Florida law as set forth in the government's motion. There being no dispute between the parties regarding the relevant Florida law, the court concludes that Florida haw prohibits:

> 1. the harvesting or possessing of any spiny lobster (*Panulirus argus*) with a tail measurement less than 5 1/2 inches.
>
> 2. the harvesting or possessing of egg-bearing spiny lobster and/or the possessing of spiny lobster or spiny lobster tails from which eggs, swimmerettes, or pleopods have been removed or stripped. The practice of stripping or otherwise molesting egg-bearing spiny lobster in order to remove the eggs is also prohibited.
>
> 3. any person, firm, or corporation to deal in any saltwater products, including lobster tails, without first paying for and procuring a saltwater products dealer license. It is unlawful to sell, deliver, ship, or transport any saltwater products without all invoices of such

court can adequately charge the jury, the government requests the court to "determine" that Honduran law:

> 1) prohibits one to harvest, process, or sell (including the sale/exportation of such lobster to a buyer outside Honduras for which payment is, made directly or indirectly to a Honduran citizen or company) any lobster the tail of which measures less than five and one-half (5 1/2) inches in length;
>
> (2) prohibits one to harvest lobster commercially between March 16 and July 31 of years 1995, 1996 and 1998. In all other years, the closed season runs from December 1 through April 30.
>
> (3) prohibits one to harvest shrimp commercially between February 1 and June 30 of each year;
>
> (4) prohibits one to harvest or destroy the eggs of any aquatic species, including spiny lobster, for profit; This includes a prohibition against the tearing out or, in any other way separating, the eggs from the female lobster, for profit;
>
> (5) prohibits one, commencing on the sixth day after the beginning of the respective lobster or shrimp closed season, to transport, sell, store, or refrigerate lobster and/or shrimp unless the lobster and shrimp were harvested prior to the first day of the closed season;

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products having thereon the wholesale dealer license number.

(6) requires lobster find shrimp fishermen to dock their vessels and unload their catch in a Honduran port prior to exportation. This duty may be fulfilled by the fishermen by either docking the vessel that caught the lobster or shrimp or transferring the catch to a licensed ship that in turn docks and unloads the catch;

(7) requires that businessmen and those who use any kind of heat for fishing activities or transportation of any fish species protected by law, including lobsters, report in writing to the governmental authorities the outcome of their fishing trip. The captain of any fishing boat has to report the departure and arrival of the boat to governmental authorities, pointing out places where the fishing was done, and the species and amount caught.

(8) prohibits one to export lobster without first processing/packing that lobster in Honduras which includes the packing of lobster into boxes that have been paraffined and labeled with (a) the business "name of the firm that makes the product, (b) the weight, (c) that it was "inspected and approved of by the Honduran Ministry of Natural Resources" and (d) the number assigned to the processing company.

The government contends that these points of law are mandated by certain Honduran statutes, regulations, and resolutions. Except as noted below, defendants do not contest the government's interpretation of the relevant Honduran statutes, regulations, and resolutions, rather, defendants' primary contention is that the resolutions upon which the government relies do not satisfy the Honduran constitutional

requirements for resolutions and, therefore, are null and void. The parties' contentions and supporting evidence are discussed *infra*.[39], [40]

Over a 2 1/2-day period, the court conducted an evidentiary hearing on the Honduran law issues. Additionally, the court has reviewed the voluminous evidentiary material submitted by the parties before, during, and after the hearing. After due consideration, the court makes the following determinations of foreign law pursuant to 18 U.S.C. § 3505(b)[41] and Fed. R. Crim. P. 12(b)[42] and 26.1.[43]

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[39] Defendants had asserted that they could not be indicted under the Lacey Act when the underlying foreign law provides only civil penalties or when the foreign government has not prosecuted them under the criminal penalties. Based on the reasons and authorities cited by the government in its briefs, the court previously denied defendants' motion to dismiss to the extent that it was predicated on either of these two grounds.

[40] The government and defendant McNab have submitted a tremendous amount of evidentiary material regarding Honduran law. Given the time constraints on the court, the court cannot possibly address each item of evidence in this written order. Nevertheless, so the record is clear, the court notes that it has carefully reviewed all of the materials submitted in English.

[41] 18 U.S.C. § 3505 provides:

> At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record or regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such a motion before trial shall constitute waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

[42] Fed. R. Crim. P. 12(b) provides, *inter alia*:

DISCUSSION

Point of Law 1—Prohibition of harvesting lobster less than 5 1/2 inches in length

The government relies on Resolution No. 030-95 (December 5, 1995) to establish that Honduras law prohibits the harvest and sale of lobster less than 5 1/2 inches in length. That resolution provides in relevant part:

> For the capture of lobster:
>
> d) The minimum size for the capture of lobster is 5.5 inches or 14.5 centimeters of abdominal length.

Resolution No. 030-95, Third Provision

Point of Law 2—Closed season for harvesting of lobster

Point of Law 3—Closed season for harvesting of shrimp

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter V, Article 41, and Resolutions No. 001-95 (January 14, 1995), No. 030-95

Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.

[43] Fed. R. Crim. P. 26.1 provides:

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

(December 5, 1995), and No. 031-97 (December 17, 1997), to establish that Honduras law prohibits the harvest of lobster and shrimp during closed seasons. The Fishing Law provides in relevant part:

> The closed season for fishing for shrimp and lobster is fixed as the period between 1 December and 30 April of each year.

The Fishing Law, Chapter V, Article 41.

The three resolutions provide in relevant part:

> FIRST: To establish closing season annually for the capture of Shrimp [and] Lobster . . . in the Atlantic Ocean, during the following periods
> a) Shrimp, from the 1st of February to the 30th of June.
> b) Lobster, from the 16th of March to the 31st of July.

Resolution No. 001-95 (establishing the closed season for the year 1995).

> FIRST: To establish closing season annually for the capture of all species of shrimp [and] lobster . . . in the Atlantic Ocean and in the coastal lagoon system, during the following periods:
> a) Shrimp, from the 1st of February to the 30th of June.
> b) Lobster, from the 16th of March to the 31st of July.

Resolution No. 030-95 (establishing the closed season for the year 1996).

> FIRST: To establish closing season for the capture of shrimp [and] lobster . . . in the Caribbean Sea and in the coastal lagoon system, during the

following time periods: a) Shrimp, from the 1st of February to the 30th of June 1998.
b) Lobster, from the 16th of March to the 31st of July 1988.

Resolution No. 031-97 (establishing the closed season for the year 1998).

The government established that the resolutions were issued by the Honduran Minister of the Department of Agriculture and Livestock and were duly published in *La Gaceta*, the official publication of the Republic of Honduras.

Defendants do not dispute the contents of the three resolutions upon which the government relies to establish Points of Law 1, 2, & 3; rather, they contend that the resolutions are null and void. To support their contention, defendants rely upon a number of legal opinions which the court has carefully reviewed.

Dr. Saul Litvinoff, a professor of law at Louisiana State University, and Efrain Moncada Silva, a professor at the National Autonomous University of Honduras and licensed member of the Honduran bar, testified that the resolutions do not meet the requirements of the Honduran Constitution in order to have "a general binding effect." Aff. of Litvinoff, p. 6. Specifically, Prof. Litvinoff testified that under Articles 245 and 248 of the Honduran Constitution, to be valid and binding, the documents must be 1) "issued in the form of a regulation, 2) "signed by the President and countersigned by the departmental secretary, and 3) published in the official form." *Id.* Prof. Salvia testified similarly.

The court has reviewed the cited portions of the Honduran Constitution and disagrees with the professors' interpretation thereof. Article 245 provides:

> The President of the Republic has the general administration of the States. His powers are: to issue accords and decrees and to issue regulating, and resolutions in accordance with law.

Article 248 provides:

> The decrees, regulations, accords, orders, and judgments of the President of the Republic must be authorized by the department secretaries or their undersecretaries in proper cases. If they fail to meet these requirements[,] they shall have no legal force.

As the court understands these two constitutional provisions, the President of the Republic of Honduras is constitutionally authorized to issue regulations and resolutions in accordance with law, and if he issues regulations, they must be authorized by the appropriate departmental secretary. However, these two provisions (which appear to be plain and straightforward) do not state (or even suggest) that the president is the only Honduran official legally authorized to issue a resolution. Buttressing the court's reading of these constitutional provisions are two important facts. First, the government presented unrebutted testimony that other Honduran departments (*e.g.*, communications and banking) had issued resolutions as a means of carrying out the laws governing those industries. Second, the testimony of virtually every witness asked was that everyone in the Honduran fishing industry, including defendant McNab and the government officials in the fishing industry, viewed the resolutions as legally binding. Indeed,

defendant McNab issued memoranda to his boat captains reminding them of the lobster size limits.

Additionally, Liliana Paz, the General Secretary in the Ministry of Agriculture and Livestock (the Honduran department responsible for the fishery management program), testified that that Honduran Ministry most certainly views the resolutions as legally binding. Secretary Paz is a graduate of the National Autonomous University of Honduras and an attorney licensed in Honduras. She is the highest level attorney within the Ministry of Agriculture and Livestock, and her job duties include providing legal advice to "the Minister in matters having to do with legal affairs, institutional communication, [and] international cooperation." Secretary Paz also has experience clerking for one of the Honduran courts. The court finds her to be well-qualified to speak to the issues regarding the validity and contents of the Fishing Law and the related regulations and resolutions. Upon observing her demeanor, the court finds Secretary Paz to be a very credible witness.

In contrast, the court found the testimony of Prof. Silva to be less than credible, as he testified that he had not, as of the date of his in-court testimony, decided whether he was going to charge defendant McNab for his legal services (including his time spent researching, drafting, and testifying).[44] Thus, it appears that this expert witness for the defense intends to charge a fee akin to a contingency fee. As for Professor Litvinoff, the value of his testimony as to what is required under Honduran law is diminished by the fact that he is not a licensed attorney in Honduras. Additionally, unlike Secretary Paz, neither of these gentlemen regularly interpret the fisheries laws, regulations, and resolutions.

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[44] Professor Silva was not asked who had paid his travel expenses to America for the purpose of testifying in this matter.

The court also notes that the Fishing Law itself specifically contemplates the implementation of resolutions such as those at issue here in furtherance of the Law. The Fishing Law of 1959, Chapter 11, Article 7, provides in relevant part:

> [The Department of Hunting and Fishing] shall be the only authority to resolve, clarify, and decide all questions raised about the conditions that must be satisfied by fisheries products, to permit them to be captured, transported or sold for consumption in the markets and for other industrial uses, and everything related to importation, exportation and licensing to which end it shall announce such resolutions an other measures as it believes necessary for fisheries activities to be as effective as possible.

The Fishing Law of 1959, Chapter 11, Article 7.

Defendants correctly point out that elsewhere in the Fishing Law, "[t]he Executive Branch, through the secretariat of Natural Resources, is the superior authority on fisheries and fisheries-related matters, and therefore, may establish and announce . . . [certain] measures [including those related to closed seasons] through regulations." The Fishing Law, Chapter I, Article 5. After review, the court is unable to reconcile Articles 5 & 7. Faced with this statutory dilemma, the court finds the testimony of Secretary Paz to be critical—namely, that the resolutions are valid, that the Honduran government views the resolutions to be valid, and that the Honduran government has acted in accordance with the resolutions.

One other item of evidence submitted by defendants merits a remark. Defendants have submitted a

one-sentence ruling issued by the Honduras Supreme Court of Justice which defendants characterize as a judicial statement by the high court that resolutions are not law. One of defendant McNab's witnesses (Honduran attorney Maria Letizia De Guillen) recently petitioned the Supreme Court challenging the constitutionality of two of the resolutions at issue before this court. In denying the petition, the high court stated *in toto*:

> Denied the admission of the petition of unconstitutionality interposed by the way of action by attorney MARIA LETIZIA DE GUILLEN because they recur against two administrative resolutions that do not have the character of law and according to article 184 of the Constitution of the Republic: the recourse of unconstitutionality only proceed against the Law by reason of form or content.

After review, this court understands the ruling to be that the Supreme Court of Justice only reviews the constitutionality of a law (*i.e.*, a statute or other form of legislation enacted by the Honduran legislative branch—National Congress) and that it does not determine the constitutionality of any "lesser" documents (*i.e.*, regulations and resolutions issued by the executive branch) notwithstanding that those "lesser" documents, have the binding force or law. According to defendants, the fact that the Supreme Court declined to address the constitutionality of the resolutions because they are not "law" does not equate to a holding by the high court that he resolutions have no binding legal effect. Defendants' argument goes too far and is simply unsupported. Honduran law clearly encompasses many mechanisms which carry the force of law notwithstanding that the mechanism is not denominated as "law" (and thereby subject to review by the Supreme Court of Justice).

Accordingly, the court concludes that the government has met its burden of establishing that Points of Law 1, 2, & 3 (as set forth on page five of this order) are valid and binding under Honduran law.

Point of Law 4—Prohibition of harvesting egg-bearing lobster or the removal of eggs from lobster

The government relies on Decree No. 154, The Fishing, Law (May 19, 1959), Chapter VII, Article 70(3), to establish that Honduras law prohibits the harvest and sale of egg-hearing lobster and the tearing out or separating in any other way the eggs from the female lobster. That law provides in relevant part:

> The following offense shall be punished with [a fine of] THREE HUNDRED LEMPIRAS or THREE HUNDRED DAYS imprisonment:
>
> * * * * *
>
> 3) Those who destroy or harvest the eggs, or the offspring of fish, chelonians, or other aquatic species for profit.

The Fishing Law, Chapter VII, Article 70(3).

Defendants do not contest the validity of the Fishing Law; rather, they argue that Article 70(3) was written to protect the eggs and young of fish, turtles, and other aquatic species which have been placed in *situ*. To this end, defendants rely on Prof. Litvinoff's supplemental affidavit in which he opines that this statutory provision does not bar the severance of the egg-bearing part of a female lobster or the harvesting of egg-bearing lobsters. Moreover, the professor suggests that the provision does not reach the harvesting of any lobsters, for "the Honduran system has always been

specific in its attempts to regulate lobster harvesting activities" and "there is no mention of lobster in this provision."

The court finds that defendants' interpretation of Article 70(3) is strained and unnecessarily limiting. The statutory provision is broadly written and clearly encompasses lobster—which is undisputedly an "aquatic species." Also, there is nothing in the plain language of the provision which indicates that it is limited to eggs in *situ*. Moreover, to read an in *situ* requirement into the statutory provision would render part of the provision an absurdity, for it is difficult to conceive of a situation in which one would destroy eggs in *situ* for profit.

Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 4 (as set forth on page five of this order) is valid and binding under Honduran law.

Point of Law 5—Only lobster and shrimp harvested during open season may be transported, sold, stored, or refrigerated after 6th day of closed season

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter VII, Articles 28 and 54, to establish that Honduras law prohibits the transport, sale, storage, or refrigeration of lobster and shrimp on or after the sixth day of the closed season unless the lobster and shrimp were harvested prior to the first day of the closed season.

The Fishing Law provides in relevant part:

> The sale and transport of species which are canned, salted, smoked, or prepared by industrial means and were caught prior to the

> start of their respective closed seasons are also authorized at all times.

The Fishing Law, Chapter IV, Article 28.

> The transport and sale of species in closed seasons . . . is permitted until the fifth day after the respective closed season has begun for the purpose of selling off existing quantities which were captured prior to the start of said closed season.

The Fishing Law, Chapter V, Article 54.

Defendants have not challenged this Point of Law or the underlying law from which it is derived. Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 5 (as set forth on page five of this order) is valid and binding under Honduran law.

Point of Law 6—Fishermen must dock, in a Honduran port, the vessel which caught lobster or shrimp and unload catch or transfer the catch to a licensed vessel that in turns docks and unloads the catch in a Honduran port.

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter VII, Article 30, to establish that Honduras law requires lobster and shrimp fishermen to dock their vessels and unload their catch in a Honduran port prior to exportation. Secretary Paz testified that, although not specifically authorized by the Fishing Law, the Honduran government deemed this requirement to be satisfied by either the docking of the vessel that caught the lobster or shrimp or the transferring of such catch to a licensed ship that in turn docks and unloads the catch in a Honduran port.

The Fishing Law provides in relevant part:

> Fishermen shall be required to dock their vessels and unload their catch in Honduran ports.

The Fishing Law, Chapter IV, Article 30.

Defendants have not challenged this Point of Law or the underlying law from which it is derived. Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 6 (as set forth on page five of this order) is valid and binding under Honduran law.

Point of Law 7—Reporting requirements

The government relies on Decree No. 154, The Fishing Law (May 19, 1959), Chapter VII, Articles 35 & 37, to establish that Honduras law requires businessmen and those who use any kind of boat for fishing activities or transportation of any fish species protected by law, including lobsters, must report in writing to government authorities the outcome of their fishing trip. The captain of any fishing boat must report the departure and arrival of the boat to government authorities, pointing out places where fishing was done and listing the species and amount caught.

The Fishing Law provides in relevant part:

> Businessmen, shipowners, employers, fishermen and sailors, as applicable to each business, boat, ship, or transport of each class dedicated to the fishing or transport of any of the species protected by this Law, are required to give to the respective officials an account or report, in writing, of the results of the fishing or fishing expedition, and to have the merchandise examined to

> verify whether regulatory requirements have been met, and to obtain the statistical data, and to allow their books to be reviewed.

The Fishing Law, Chapter IV, Article 35.

> All fishing boat captains shall report to the appropriate office when they depart for work and when they return, indicating fishing places, species and quantities caught:

The Fishing Law, Chapter IV, Article 37.

Defendants have not challenged this Point of Law or the underlying law from which it is derived. Accordingly, the court concludes that the government from has met its burden of establishing that Point of Law 7 (as set forth on page six of this order) is valid and binding under Honduran law.

Point of Law 8—Inspection, processing, and packing requirements

The government relies on Agreement No. 0008-93 (January 13, 1993), Articles 3, 4, & 49, to establish that Honduras law prohibits the exportation of lobster without first having it officially inspected for health and sanitation and processed/packed at an approved establishment in Honduras, which includes the packing of lobster into boxes that have been paraffined and labeled with the business name of the firm that makes the product, the weight, that it was "Inspected and Approved of by the Honduran Ministry of Natural Resources" and the number assigned to the processing company. This "Agreement" is a regulation under Honduran law, it was duly published in *La Gaceta*, and defendants do not dispute its validity. As Secretary Paz testified, the Agreement contains the inspection, industrial,

health, and hygiene regulations for the protection of fishery products.

Agreement No. 0008-93 provides in relevant part:

> The ones subject to the Official Inspection are the fishing vessels, storing centers and plants that capture, gather, industrialize and pack fishing products.
>
> In agreement with the present Regulation only the products previously inspected can be offered for sale.
>
> Products for export can only be the ones processed in plants approved for that purpose.

Agreement No. 0008-93, Article 3.

> Fish, crustaceans, molluscs, anurous reptiles and mammals of comestible type, from fresh or salt water, assigned for internal consumption or export and by extension are also included the subproducts obtained from the same mentioned products.

Agreement No. 0008-93, Article 4.

For the icing and packing of the products it will be observed:

h) The packing must be made in boxes with the appropriate label, treated with paraffin and the size must have been approved during the registration process. They must have the following legend:
1st) The name or trade name of the business that manufactured the product.

> 2nd) The weight.
> 3rd) The legend "Product of Honduras" that can be also placed in another language.
> 4th) A 3 (three) centimeter circle, "Inspected and Approved by the Department of Natural Resources of Honduras" and the number assigned to the establishment doing the processing.
> 5th) In addition, it can have printed the different denominations of the size of the product.

Agreement No. 0008-93, Article 49(h).

Defendants do not object to the first part of this statement of law, *i.e.*, that it is prohibited under Honduran law to export lobster without first having it officially inspected for health and sanitation and processed at an approved establishment in Honduras. Additionally. all parties agree that a fishing vessel can constitute a processing "plant," provided it meets the detailed requirements of a processing plant under the Fishing Law. Rather, the dispute between the parties turns on the definition of "processing," a term that is not specifically defined in the Agreement.

Based on the evidence presented, the court concludes that "processing" fish products for exportation includes inspection, grading, the preparation of the products for packaging, and the packaging itself. Secretary Paz testified that processing includes packaging. Mike Powers of Garden Restaurants testified that partial processing can occur onboard the fishing vessel, including the measuring and cutting off the lobster tails, washing, deveining, and dipping the product into an approved preservative. However, the "process" is not complete until the product is graded, the official inspector (or his selected technician) inspects and

approves the product, and it is properly packaged for exportation.

Finally, defendants make much of the fact that Agreement 0008-93, Article 5(t), permits the use of plastic as part of the packing materials.[45] However, Article 49 of Agreement 0008-93 plainly requires that the product ultimately be placed in a paraffined box prior to exportation, with the box appropriately labeled with the requisite information. Additionally, Secretary Paz testified that packing lobster in plastic bags—without more—for exportation is not adequate under Honduran law.

Accordingly, the court concludes that the government has met its burden of establishing that Point of Law 8 (as set forth on page six of this order) is valid and binding under Honduran law.

CONCLUSION

It is ORDERED that defendant McNab's "Motion to Dismiss Counts One through Twelve and Counts twenty-Eight Through Forty-Three of the Indictment," (doc. 53), and "Motion to Dismiss the Superseding Indictment," (doc. 151), are DENIED.

Nothing in this order should be construed as expressing, an opinion or making a finding as to the innocence or guilt of any of the defendants. It will be for the

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[45] Agreement 0008-93, Article 5(t) provides:

> Packing Materials: All the materials such as sheets of aluminum, plastic, wax paper, cardboard boxes and others, used to cover and protect the fishing products, and that have been approved by the Department.

The fact that the Agreement permits the use of plastic as a packing materials is not surprising given the extensive regulations regarding the use of ice.

jury to decide whether the government proves any of the defendants guilty of any of the charges beyond a reasonable doubt. The fact that the court has "determined" the applicable Honduran law does not mean that the government has proven that any of the defendants have violated Honduran law or that the lobster or shrimp at issue in his case were taken, possessed, etc., in violation of Honduran law.

The Clerk is DIRECTED to send a copy of this order to counsel for all parties by facsimile.

DONE this 12th day of October, 2000.

/s/
RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

UNITED STATES OF AMERICA [Filed August 28, 2001]

v. CRIMINAL ACTION NO. 1:00-00079-(1, 2, 3, & 4)-RV

DAVID HENSON MCNAB, ROBERT D. BLANDFORD, ABNER SCHOENWETTER, DIANE H. HUANG

ORDER

This matter is before the court on the following documents:

1. "Alternative Motions Based on Honduran Law Developments," (doc. 336), filed by defendant David Henson McNab; [46] [47]

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[46] The "Alternative Motions"—which are premised on essentially the same grounds—are a "Motion to Dismiss," a "Motion for New Trial Based on Newly Discovered Evidence," and a Motion for Redetermination of Foreign Law."

[47] Defendants Robert D. Blandford and Abner J. Schoenwetter adopted defendant McNab's "Alternative Motions," (docs. 346 & 342, respectively). Defendant Diane H. Huang filed her own motion, also titled "Alternative Motions Based on Honduran Law Developments," (doc. 344), which is predicated on essentially the same

2. "Notice of Filing Regarding Hygiene Regulation Repeal," (doc. 325), filed by defendant McNab;

3. "Notice of Filing Regarding Annulment Action," doc. 324), filed by defendant McNab;

4. "Notice of Filing Regarding Fishing Law Changes," (doc. 326), filed by defendant McNab;

5. Supplemental Filing in Support of Alternative Motions," (doc. 341), filed by defendant McNab;

6. Second Supplemental Filing in Support of Alternative Motions, (doc. 371), filed by defendant McNab;

7. "Second Response to Defendants' Alternative Motions Based on Issues of Honduran Law," (doc. 387), filed by the government;[48]

and

8. Reply Declaration, (doc. 388), filed by defendant McNab.[49]

INTRODUCTION

Following a jury trial, defendants were convicted of, *inter alia*, conspiring to violate the Lacey Act, 16 U.S.C. § 3371 *et seq.* Stated generally, the Lacey Act makes it unlawful to import into the United States fish or wildlife that

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grounds and evidence as McNab's alternative motions. For simplicity's sake, the court will refer only to the alternative motions filed by defendant McNab, although the court's ruling applies to all four defendants.

[48] The government's "Second Response" supercedes the government's first response. (doc. 378).

[49] During the hearing held by the court on August 17, 2001, the court granted Defendant McNab's "Motion for Leave to File Reply Declaration," (doc. 388), without objection by the government.

has been taken or acquired in violation of another country's laws. In this case, the government contended that defendants violated Honduran law in various ways when they conspired to import spiny lobster tails on multiple occasions over a five-year period. Prior to trial, the court made a number of determinations with respect to Honduran law pursuant to 18 U.S.C. § 3505(b)[50] and Fed. R. Crim. P. 12(b)[51] and 26.1.[52]

In his pending post-trial "alternative motions," defendant McNab has requested the court to revisit its Honduran law determinations, at least as to three particular

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[50] Title 18 U.S.C. § 3505 provides:

> At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record or regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such a motion before trial shall constitute waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

[51] Fed. R. Crim. P. 12(b) provides, *inter alia*:

> Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion.

[52] Fed. R. Crim. P. 26.1 provides:

> A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

points. Because the court's jurisdiction was potentially impacted by the newly-raised grounds, the court ordered the government to file a response and, following that response, held a hearing on August 17, 2001. After full consideration of the arguments of counsel and the evidence submitted, the court concludes that the alternative motions are due to be denied.

DISCUSSION

Point of Law 1—Lobster Size Limits—Annulment of Resolution 030-95

In its original ruling on Honduran law, the court determined that Honduran Resolution 030-95, Third provision, prohibits the harvesting of spiny lobsters which are less than 5 1/2 inches in length. Defendant McNab contends that Resolution 030-95 has been annulled by a Honduran court and that, pursuant to Article 96 of the Honduran Constitution, the annulment operates retroactively in favor of a criminal defendant such as himself. The annulment action was instituted by McNab following this court's original ruling on Honduran law.

The government does not contest defendant McNab's assertion that the Honduran "Court of the First Instant of Administrative Law" declared Resolution 030-95 to be voided. Rather, the government points out, correctly so, that the Honduran administrative court declared the resolution to be void "but ... only for purposes of [its] annulment and future inapplicability. This Resolution does not confer any right to claims." Although the legal meaning of this limitation language under Honduran law is not entirely clear to the undersigned, the court concludes that the administrative court intended to give its pronouncement prospective, rather than retroactive, effect.[53]

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[53] It would seem that a judge could not unilaterally declare the effect of his/her ruling to be non retroactive, for Article 96 of

Even if the administrative court's voidance of Resolution 030-95 should be given retroactive effect, the express language of the administrative court's ruling provides that it will not be a final judgment if an appeal is timely taken. It is undisputed that the Honduran government (which contested the annulment action before the administrative court) timely appealed the ruling. Consequently, the administrative ruling is not a final judgment, and it has no legal effect in Honduras. Because the administrative decision is not Honduran law now and because the evidence establishes that the Honduran government continues to enforce Resolution 030-95, the court concludes that Resolution 030-95 continues to be valid under Honduran law.

Point of Law 2—Processing/Packaging Rules—Repeal of Agreement 0008-93

In its original ruling, the court concluded that Agreement No. 0008-93 prohibits the exportation of lobster without first having it officially inspected for health and sanitation and processed/packed at an approved establishment in Honduras, which includes the packing of lobster into boxes that have been paraffined and labeled with (a) the business name of the firm that makes the product, (b) the weight, (c) that it was "Inspected and Approved of by the Honduran Ministry of Natural Resources" and (d) the number assigned to the processing company.

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the Honduran Constitution would appear to "trump" any such declaration. This court need not decide that issue, however, because the government submitted evidence which the court understands to mean that an Honduran administrative court lacks the power to void a resolution with respect to criminal acts. *See* affidavit of Jose Bernardo Torres Umanzor ("since the judgment deals with an Administrative and not a Criminal matter, it has no retroactive effect and only has effects for its future inapplicability.").

It is undisputed that Agreement 0008-93 was issued pursuant to Decree No. 40 of May 16, 1973. It is also undisputed that Decree No. 40 was expressly repealed effective January 13, 1995, by Decree No. 157-94. From this, defendant McNab argues that the repeal of Decree No. 40 operated as a repeal of Agreement 0008-93. In support of this position, defendant McNab offered the affidavit of Ramiro Lozano, an Honduran attorney and law professor, who opined that "regulations are automatically repealed when the law under which they were issued is repealed."[54]

The Honduran Civil Code provides in relevant part:

> Article 42—A law may be revoked totally or partially by another law.
>
> Article 43—The revocation of the law may be express or tacit.
>
> It is express when the new law expressly revokes the law that antecedes it.
>
> It is tacit when the new law contains rules that may not be conciliated with the old law.
>
> Article 44—The express repeal may be total or partial, as set forth by the repealing law. The tacit repeal leaves in effect in the previous law anything not in conflict with the provisions of the new law, even though both versions may cover the same matter.

As the government points out, one of the objectives of the new decree (No. 157-94) was "to strengthen the phytozoosanitation, mainly in that which refers to the . . .

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[54] Defendant McNab offered the affidavits of other Honduran attorneys who offered similar, if not identical, opinions.

control of products that are of animal and plant origin." Relying on Article 44 of the Honduran Civil Code, the government contends that "Agreement 0008-93 remained in effect following the repeal of Decree No. 40, at the very least to the extent that it did not impinge on the provisions of the new law." The court agrees. To conclude otherwise would mean that the passage of a law intended to strengthen the existing law would result in a weaker, if not impotent, new law during that window of time until the appropriate ministry or agency had sufficient time to draft, and the appropriate governmental official(s) to sign and publish, new regulations. Such a result is untenable if the Honduran National Congress had simply repealed Decree No. 40 without passing a new decree covering the same area of the law, then this court would readily conclude that Agreement 0008-93 no longer carried the force of law. That is not the case here, however. At all relevant times a decree existed covering the area of phytozoosanitation, and Agreement 0008-93 continued in effect when the new decree became effective, at least to the extent that Agreement 0008-93 was not inconsistent with the new decree.

There are two additional facts which buttress the court's conclusion. First, the Honduran governmental officials responsible for the enforcement of Decree No. 40, Decree No. 157-94, and Agreement 0008-93 continued to enforce Agreement 0008-93 after Decree No. 157-94 was enacted. Second, when the Honduran government decided to create new regulations for the enforcement of Decree No. 157-94, it did so by the passage of Accord No. 1081-99 five years after Decree No. 157-94 became effective. Decree No. 1081-99 specifically repealed Agreement 0008-93. If Agreement No. 0008-93 had been "automatically" repealed by the mere passage of Decree No. 157-94 in 1994 as defendant McNab argues, then there would have been no reason for Honduras to expressly repeal Agreement 0008-93

in 1999 as so provided automatically repealed Agreement 0008-93 in 1999 as so provided in Accord No. 1081-99.

Accordingly, the court concludes that Agreement 0008-93 remained in effect following the passage of Decree No. 157-94 and up to the passage of Accord No. 1081-99 and, therefore, was in effect at all times relevant to the charged conduct in the Second Superseding Indictment.

Point Three—Egg-Bearing Lobsters—Amendment of Article 70(3) of the Fishing Law

Defendant McNab correctly notes that Article 70 of the Fishing Law was amended by the Honduras National Congress in Decree No. 245-2000, which became effective on February 5, 2001. Defendant McNab also correctly notes that the amended Article 70 reenacted and restated some of the prohibitions of the former Article 70. As this court determined in its original ruling, the (now) former Article 70 prohibited the harvesting of egg-bearing lobsters. The amended Article 70 does not contain a specific prohibition against the harvesting of egg-bearing lobsters. The absence of a specific prohibition regarding the harvesting of egg-bearing lobster, combined with Article 96 of the Honduran Constitution (which provides that a change in the law does not have a retroactive effect except in criminal cases when the change benefits the accused), constitute the basis for defendant McNab's assertion that all counts (and convictions) predicated on a violation of the former Article 70 are due to be dismissed.

It is true that the Honduran National Congress reworked Article 70. The amended legislation contains 10 specific prohibitions and 1 catch-all provision. Namely, the following conduct is sanctionable:

(a) Fishing with chemical or explosive elements;

(b) Fishing carried out by unlicenced persons or persons with expired licenses;

(c) Fishing with prohibited gear;

(d) Catching for commercial purposes during the closed season;

(e) Clearing mangrove swamps or destroying ecosystems in general;

(f) Polluting with any substance the maritime or continental waters;

(g) Catching, destroying, or removing protected hydrobiological species, especially manatees;

(h) Shipowners or captains of vessels that fail to report their catch;

(i) Carrying out scientific research without a permit from the National Fisheries Authority;

(j) Shipowners or captains of vessels that fail to comply with the provisions related to the installation of the Sea Turtle Excluding Devices (DETs) as set forth by the National Fisheries Authority; and

(k) Any other activity not expressly mentioned in the preceding items indicated with letters but which is analogous.

In response, the government observes that the intent of the Honduran National Congress in amending Article 70 was to increase the monetary sanctions to reflect present currency valuations, thereby putting some teeth into the law:

> WHEREAS the current Fisheries Law . . . sets forth sanctions of an administrative nature, the amounts of which do not represent coercive

> measures that reflect the gravity of the violations committed, so that it is necessary to revise these sanctions according to the importance of the case and the current value of the national currency.

The government urges that those specific prohibitions contained in the former Article 70 but not in the amended Article 70 (including the egg-bearing lobster prohibition at issue here, as well as the prohibitions of catching lower weight fish, crustaceans, and chelonians, and catching a quantity too large to be transported in one's own vessel) remain in effect except to the extent that they are inconsistent with the new prohibitions. Because there is nothing in the amended Article 70 which is inconsistent with a prohibition against harvesting egg-bearing lobster, the government contends that the harvesting of egg-bearing lobster prohibition remains in effect, if not on its own, then at least through the catch-all provision "(k)" of the amended Article 70.

Of the three changes in Honduran law which defendant McNab advances in his alternative motions, it is this ground which gives the court the most pause. It is troubling that the Honduran National Congress would specifically "bring over" certain prohibitions from the former Article 70 into the amended Article 70, and choose not to specifically "bring over" other prohibitions, only for this court to conclude that the prohibitions not expressly brought over are still valid law to the extent that they are not inconsistent with the amended Article 70. Nevertheless, after full consideration, the court concludes that that is exactly what this court must do in light of Honduran Civil Code Articles 42, 43 & 44. This conclusion is buttressed by the stated purpose of the amendment—to increase the penalties—not to reduce the prohibited conduct. This conclusion gains additional support from the affidavit of

Liliana Paz, General Secretary in the Ministry of Agriculture and Livestock, the department of the Honduran government ultimately responsible for the enforcement of the fisheries law, to which she states (albeit without much elaboration) that "the destruction or harvest of eggs of aquatic species remains prohibited under Honduran law, subject to greater penalties."

Accordingly, the court concludes that the harvesting and destruction of egg-bearing lobsters continues to be prohibited conduct under Honduran law.

CONCLUSION

After due consideration, it is

ORDERED that defendant McNab's alternative motions are DENIED for the foregoing reasons.

The Clerk is DIRECTED to send a copy of this order to counsel for all parties by facsimile.

DONE this 28th day of August, 2001.

/s/
RICHARD W. VOLLMER, JR
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	*	
vs.	*	CRIMINAL NO. 00-0079-RV
DAVID HENSON MCNAB, ROBERT D. BLANDFORD, ABNER J. SCHOENWETTER AND DIANE H. HUANG, Defendant.	*	

ORDER

The above-styled case came on for a trial by jury on October 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31, 2000 and November 1, 2 and 3, 2000 with the Honorable Richard W. Vollmer, Jr., United States District Judge presiding. The jury was selected but not sworn on October 3, 2000 before the Honorable William H. Steele, United States Magistrate Judge.

On October 16, 2000, the jury was duly sworn and trial commenced. The government presented its case-in-chief on October 16 through October 25, 2000 and rested. At the conclusion of the government's case the court heard argument on the defendants, David Henson McNab, Robert D. Blandford, Abner J. Schoenwetter and Diane H. Huang's motions for judgment of acquittal which was DENIED in part and GRANTED in part as to the "closed season" and "shrimp" violations referenced in the second superseding indictment. Consequently, the court instructed the jury to disregard all allegations in the second superseding indictment regarding "closed season" and "shrimp" violations as to all of the defendants.

On October 26, 2000, the defendant David Henson McNab presented his evidence and rested. The defendants Abner J. Schoenwetter, Robert D. Blandford and Diane H. Huang rested without presenting any further evidence. At the conclusion of all the evidence, the defendants renewed their motions for judgment of acquittal which were DENIED as set out in the record.

On October 27, 2000, the court held a charge conference with counsel and defendants present and the respective parties presented their closing arguments to the jury. The court charged the jury on the applicable law and the jury commenced their deliberations.

On October 30 and 31, 2000 and November 1, 2 and 3, 2000, the jury reconvened to continue their deliberations. Now, on this the 3rd day of November 2000, comes the jury who having heard the evidence; the arguments of counsel, the charge of the court and having considered the same upon their oaths return the following verdicts into open court with counsel and defendants present, copies of which are attached hereto and made a part of this order.

It is therefore ADJUDGED that the defendant David Henson McNab has been found GUILTY and CONVICTED of the offense of violations of Title 18, United States Code, Sections 545, 1956(a)(1)(A)(i) and 2 and Title 16, United States Code, Sections 3372(a)(2)(A), 3373(d)(1)(B) and, 3373(d)(1)(A) as charged in count one, subsections (a), (b), (c) and (d) of the second superseding indictment; and Title 18, United States Code, Sections 845 and 2 as charged in courts two through twelve of the second superseding indictment; and Title 18, United States Code, Sections 1957 and 2 as charged in counts twenty-eight through forty-two of the second superseding indictment; and Title 18, United States Code, Sections 1957 and 1956(h) as charged in count forty-three of the second superseding indictment.

It is ADJUDGED that the defendant Robert D. Blandford has been found GUILTY AND CONVICTED of violations of Title 18, United States Code, Sections 545, 1956(a)(1)(A)(i) and 2 and Title 16, United States Code, Sections 3372(a)(2)(A), 3373(d)(1)(B) and, 3373(d)(1)(A) as charged in count one, subsections (a), (b), (c) and (d) of the second superseding indictment; and Title 18, United States Code, Sections 845 and 2 as charged in courts two through twelve of the second superseding indictment; and Title 16, United States Code, Sections 3372(a)(2)(A) and 3373(d)(1)(B) and Title 18, United States Code, Section 2 as charged in counts thirteen through twenty-two of the second superseding indictment and Title 16, United States Code, Sections 3372(a)(2)(A) and 3373(d)(2) of the lesser included offense as charged in counts twenty-six and twenty-seven of the second superseding indictment; and Title 18, United States Code, Sections 1957 and 2 as charged in counts twenty-eight through thirty-nine of the second superseding indictment; and Title 18, United States Code, Sections 1957 and 1956(h) as charged in count forty-three of the second superseding indictment.

It is ADJUDGED that the defendant ABNER J. SCHOENWETTER has been found GUILTY AND CONVICTED of the offense violation of Title 18, United States Code, Sections 545, 1956(a)(1)(A)(i) and 2 and Title 16, United States Code, Sections 3372(a)(2)(A) and 3373(d)(1)(B) as charged in count one, subsections (a), (b) and (d) of the second superseding indictment; and the lesser included offense in violation of Title 16, United States Code, Sections 3372(a)(2)(A) and 3373(d)(2) and Title 18, United States Code, Section 2 as charged in counts thirteen through twenty-seven of the second superseding indictment; and Title 16, United States Code, Sections 3372(d) and 3373(d)(3)(A)(i) and Title 18, United States Code, Section 2 as charged in count forty-seven of the second superseding indictment. It is further ADJUDGED that the defendant DIANE H. HUANG has been found NOT GUILTY and ACQUITTED of the offense of violation of Title 16, United States Code, Sections 3372(a)(2)(A) and 3373(d)(1)(A) as charged in subsection (1)(c).

Upon completion of the reading of each defendant's verdict, the jury was duly polled by the court. The parties notified the court that the forfeiture count of the second superseding indictment had been settled as set out on the record.

The government made an oral motion to increase the bond conditions of the defendant DAVID HENSON MCNAB which was GRANTED. The defendant DAVID HENSON MCNAB was released on a bond in the amount of $2,000,000.00 with the condition that he be allowed to keep his passport and upon his oral waiver to the court of extradition and his agreement to be sentenced *in absentia* should he fail to return to the United States for his sentencing which is POSTPONED to March 16, 2001 at 9:00 a.m.

The defendants ROBERT D. BLANDFORD and DIANE H. HUANG were released on their present conditions of release pending imposition of sentencing which is POSTPONED to March 2, 2001 at 10:00 a.m. The defendant ABNER J. SCHOENWETTER was released on his present conditions of release pending imposition of his sentence which is POSTPONED to March 16, 2001 at 9:00 a.m.

DONE this the 4th day of December, 2000.

\s\
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15148, No. 02-10810, No. 02-11264

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DAVID HENSON MCNAB, ROBERT D. BLANDFORD, et al., Defendants-Appellants. UNITED STATES OF AMERICA, Plaintiff-Appellee, versus ABNER SCHOENWETTER, ROBERT D. BLANDFORD, Defendants-Appellants. UNITED STATES OF AMERICA, Plaintiff-Appellee, versus DAVID HENSON MCNAB, ABNER SCHOENWETTER, et al., Defendants-Appellants.

May 29, 2003

Before HULL, WILSON and FAY, Circuit Judges.

ORDERED:

The petitions for rehearing are granted in part by deleting entirely footnote 24 from the Court's opinion which was issued on March 21, 2003. The court will issue a substituted opinion making that deletion. The Court otherwise denies

the petitions for rehearing of defendants' McNab, Schoenwetter, Huan, Blandford and Embassy of Honduras.

No member of this Court having requested a poll, we deny the suggestion for rehearing en banc. See F.R.App.P. 35(a); Eleventh Circuit rule 35-5.

FAY, Circuit Judge, dissents.

APPENDIX F

CHAPTER 53--CONTROL OF ILLEGALLY TAKEN FISH AND WILDLIFE
16 U.S.C. § 3371. Definitions

For the purposes of this chapter:

* * *

(c) The term "Indian tribal law" means any regulation of, or other rule of conduct enforceable by, any Indian tribe, band, or group but only to the extent that the regulation or rule applies within Indian country as defined in section 1151 of Title 18.

(d) The terms "law," "treaty," "regulation," and "Indian tribal law" mean laws, treaties, regulations or Indian tribal laws which regulate the taking, possession, importation, exportation, transportation, or sale of fish or wildlife or plants.

§ 3372. Prohibited acts

(a) Offenses other than marking offenses

It is unlawful for any person--

(1) to import, export, transport, sell, receive, acquire, or

purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;

(2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce--

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law, or

(B) any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of Title 18)--

(A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or

(B) to possess any plant taken, possessed, transported, or sold in violation of any law or regulation of any State;

(4) to attempt to commit any act described in paragraphs (1) through (4).

(b) Marking offenses

It is unlawful for any person to import, export, or transport in interstate commerce any container or package containing any fish or wildlife unless the container or package has previously been plainly marked, labeled, or tagged in accordance with the regulations issued pursuant to paragraph

(2) of section 3376(a) of this title.

* * *

(d) False labeling offenses

It is unlawful for any person to make or submit any false record, account, or label for, or any false identification of, any fish, wildlife, or plant which has been, or is intended to be--

(1) imported, exported, transported, sold, purchased, or received from any foreign country; or

(2) transported in interstate or foreign commerce.

§ 3373. Penalties and sanctions

(a) Civil penalties

(1) Any person who engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty, or regulation, and any person who knowingly violates section 3372(d) of this title, may be assessed a civil penalty by the Secretary of not more than $10,000 for each such violation: *Provided,* That when the violation involves fish or wildlife or plants with a market value of less than $350, and involves only the transportation, acquisition, or receipt of fish or wildlife or plants taken or possessed in violation of any law, treaty, or regulation of the United States, any Indian tribal law, any foreign law, or any law or regulation of any State, the penalty assessed shall not exceed the maximum provided for violation of said law, treaty, or regulation, or $10,000,

whichever is less.

(2) Any person who violates section 3372(b) of this title may be assessed a civil penalty by the Secretary of not more than $250.

(3) For purposes of paragraphs (1) and (2), any reference to a provision of this chapter or to a section of this chapter shall be treated as including any regulation issued to carry out any such provision or section.

(4) No civil penalty may be assessed under this subsection unless the person accused of the violation is given notice and opportunity for a hearing with respect to the violation. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which a person may have taken or been in possession of the said fish or wildlife or plants.

(5) Any civil penalty assessed under this subsection may be remitted or mitigated by the Secretary.

(6) In determining the amount of any penalty assessed pursuant to paragraphs (1) and (2), the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, ability to pay, and such other matters as justice may require.

* * *

(d) Criminal penalties

(1) Any person who--

(A) knowingly imports or exports any fish or wildlife or

plants in violation of any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title), or

(B) violates any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) by knowingly engaging in conduct that involves the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants with a market value in excess of $350,

knowing that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation, shall be fined not more than $20,000, or imprisoned for not more than five years, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(2) Any person who knowingly engages in conduct prohibited by any provision of this chapter (other than subsections (b) and (d) of section 3372 of this title) and in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation shall be fined not more than $10,000, or imprisoned for not more than one year, or both. Each violation shall be a separate offense and the offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said fish or wildlife or plants.

(3) Any person who knowingly violates section 3372(d) of this title--

(A) shall be fined under Title 18, or imprisoned for not more than 5 years, or both, if the offense involves--

(i) the importation or exportation of fish or wildlife or plants; or

(ii) the sale or purchase, offer of sale or purchase, or commission of an act with intent to sell or purchase fish or wildlife or plants with a market value greater than $350; and

(B) shall be fined under Title 18, or imprisoned for not more than 1 year, or both, if the offense does not involve conduct described in subparagraph (A).

§ 3374. Forfeiture

(a) In general

(1) All fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the provisions of section 3372 of this title (other than section 3372(b) of this title), or any regulation issued pursuant thereto, shall be subject to forfeiture to the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution included in section 3373 of this title.

(2) All vessels, vehicles, aircraft, and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish or wildlife or plants in a criminal violation of this chapter for which a felony conviction is obtained shall be subject to forfeiture to the United States if (A) the owner of such vessel, vehicle, aircraft, or equipment was at the time of the alleged illegal act a consenting party or privy thereto or in the exercise of

due care should have known that such vessel, vehicle, aircraft, or equipment would be used in a criminal violation of this chapter, and (B) the violation involved the sale or purchase of, the offer of sale or purchase of, or the intent to sell or purchase, fish or wildlife or plants.

§ 3378. Miscellaneous provisions

(a) Effect on powers of States

Nothing in this chapter shall be construed to prevent the several States or Indian tribes from making or enforcing laws or regulations not inconsistent with the provisions of this chapter.

(b) Repeals

The following provisions of law are repealed:

(1) The Act of May 20, 1926 (commonly known as the Black Bass Act; 16 U.S.C. 851-856).

(2) Section 667e of this title and sections 43 and 44 of Title 18 (commonly known as provisions of the Lacey Act).

(3) Sections 3054 and 3112 of Title 18.

(c) Disclaimers

Nothing in this chapter shall be construed as--

(1) repealing, superseding, or modifying any provision of Federal law other than those specified in subsection (b) of this section;

(2) repealing, superseding, or modifying any right, privilege, or immunity granted, reserved, or established

pursuant to treaty, statute, or executive order pertaining to any Indian tribe, band, or community; or

(3) enlarging or diminishing the authority of any State or Indian tribe to regulate the activities of persons within Indian reservations.

APPENDIX G

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 27--CUSTOMS
545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law--

Shall be fined under this title or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

APPENDIX H

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 95--RACKETEERING
1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

* * *

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant s knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant s subsequent statements or actions indicate that the defendant believed such representations to be true.

* * *

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

* * *

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

* * *

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 95--RACKETEERING

1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the

criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section--

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a

financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person 's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term 'criminally derived property' means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term 'specified unlawful activity' has the meaning given that term in section 1956 of this title.

APPENDIX I

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 1--GENERAL PROVISIONS
18 U.S.C. 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

* * *

18 U.S.C. § 371 CONSPIRACY TO COMMIT OFFENSES OR TO DEFRAUD UNITED STATES

If two or more persons conspire either to commit any offenses against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

FEDERAL RULE OF CRIMINAL PROCEDURE
RULE 26.1 DETERMINATION OF FOREIGN LAW

A party who intends to raise an issue concerning the law of a foreign country shall give reasonable written notice. The court, in determining foreign law may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

APPENDIX J

FLORIDA ADMINISTRATIVE CODE ANNOTATED TITLE 68. FISH AND WILDLIFE CONSERVATION COMMISSION SUBTITLE 68B. MARINE FISHERIES CHAPTER 68B-24. SPINY LOBSTER (CRAWFISH) AND SLIPPER LOBSTER

68B-24.003. Minimum Size Limits.

(1) No person shall harvest or possess any spiny lobster with a carapace measurement of 3 inches or less or, if the tail is separated from the body, a tail measurement less than 5 1/2 inches not including any protruding muscle tissue, except as may be provided in subsection (3) of this rule.

* * *

(1) The harvest or possession of eggbearing spiny lobster is prohibited. Eggbearing spiny lobster found in traps shall be immediately returned to the water free, alive, and unharmed. The practice of stripping or otherwise molesting eggbearing spiny lobster in order to remove the eggs is prohibited and the possession of spiny lobster or spiny lobster tails from which eggs, swimmerettes, or pleopods have been removed or stripped is prohibited.

* * *

FLORIDA STATUTE

§ 370.07 Wholesale and retail saltwater products dealers; regulation.-

(1) DEFINITIONS; LICENSES AUTHORIZED.- Annual license or privilege taxes are hereby levied and imposed upon dealers in the state in saltwater products. It is

unlawful for any person, firm, or corporation to deal in any such products without first paying for and procuring the license required by this section. Application for all licenses shall be made to the Department of Environmental Protection on blanks to be furnished by it. All licenses shall be issued by the department upon payment to it of the license tax.

APPENDIX K

COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW, TEGUCIGALPA, Municipality of the Central District, the twenty-third day of May of the year two thousand one. IN VIEW OF THE FOLLOWING: In order to render a Final Sentence, the lawsuit with the incoming number 179-00, filed by the attorney Maria Letizia Suazo de Guillén, of full age, of Honduran nationality and domiciled in this city, in her capacity as attorney for Mr. David Henson McNab against the State of Honduras through the Secretariat of the State of the Offices of Natural Resources, now Secretariat of State in the Offices of Natural Resources and the Environment, is suing for the absolute nullity of acts of a general nature because of a defect in competent jurisdiction of the exercise of the regulatory power attributed by the Constitution solely to the President of the Republic in the central public administration. THE PARTIES ARE: Plaintiff: Mr. David Henson McNab, represented in court by the attorney Marco Antonio Lanza. Defendant: The State of Honduras represented in court by the attorney Héctor Ramón Tróchez, who substituted the attorney Jose Bernardo Torres U. WHEREAS (1) the plaintiff alleges the following facts: 1) On January 4, 1995, the Secretariat of State of Natural Resources and the General Directorate of Fisheries and Agriculture issued what they called "Resolution No. 001-95," signed by the then Minister of that area and the Director General of Fisheries (DIGEPESCA), setting forth regulatory standards concerning the closed season for shrimp, lobsters and conchs in the Atlantic Ocean, as well as the forms or means for catching lobsters and shrimp. 2) On December 5th, the same authorities issued what they called "Resolution No. 030-95," whereby they set

forth regulations concerning the closed season for catching shrimp, lobsters and conchs in the Atlantic Ocean, in addition to the nets of shrimp boats and provisions for catching lobsters and the minimum date for catching conchs. 3) On December 17, 1997, the Secretariat of State for Agriculture and Livestock and the Director General of Fisheries and Agriculture issued what they called, "Resolution no. 031-97," signed by the Minister, the Director General of Fisheries and the Secretary General of the aforesaid Secretariat of State whereby they set forth general provisions related to the closed season for catching shrimp, lobsters and conchs in all of the species in the Caribbean Sea and coastal laguna systems and, in addition, the closed season for the giant conch. 4) On April 3, 2000, the Secretariat of Agriculture and Livestock and the Director General of Fisheries and Agriculture issued what they called "Resolution No. 006-2000," by means of which they set forth general provisions establishing the closed season for catching white shrimp, brown shrimp and pink shrimp, as well as the closed season for catching the common lobster, giant conch and queen conch and, in addition, other regulations related to fishing vessels and indicating sanctions for certain violations of these general rules. 5) The aforementioned Resolutions are invalid because the first two were issued by the Secretary of State in the Offices of Natural Resources and the Director General of Fisheries and Aquiculture and the last two by the Secretary of State in the Offices of Aquiculture and Livestock and the Director General of Fisheries and Agriculture with the countersignature of the Secretary General of the aforesaid Secretariat of State, without having competent jurisdiction to issue the aforesaid regulatory rules because the power belongs in the Central Administration to the President of the Republic pursuant, to Article 245, Item 11, of the Constitution and the Secretaries of State only authorize with their signature the regulations of the President pursuant to Article 248 of the Constitution itself. Accordingly, issuing administrative acts of a general nature outside the law, i.e., in

violation of the Constitution, are absolutely null and void as ordered by Articles 321 of the Constitution and 34, Paragraph One, of the Administrative Procedure Law, which reads verbatim: "Notwithstanding what is set forth in the essential laws, the administrative act is null and void . . .". The Constitution is a special law in the political and legal order, because it structures the organization of the State and the rights of the governed; it is, doubtless, the most special law of all laws in the legal order because it creates the organs of the State and creates the law. Furthermore, according to Article 36 of General Law of the Public Administration, the Secretaries of State, with regard to the regulatory power, only have the power of "issuing the regulations of internal organization of their respective offices" and only by a Law of the Congress may a given Secretariat of State be given regulatory power, in which case the law expressly states this mentioning the Secretariat of State that will enjoy this prerogative because, when the law uses the expressions, "by means of the Secretariat of Natural Resources . . .", as in Article 5, Paragraph One, of the Fisheries Law or else the Executive Branch through the Secretariat of Natural Resources, as in Article 11 of the aforesaid Law, it obviously uses the term Executive Power referring to the President of the Republic, who is its Office Holder, and not the Secretariat of State in the area, who is nothing more than the assistant of the President as conceived by Article 247 of the Constitution. 7) In addition to being defective with absolute nullity because of a lack of competent jurisdiction, the Resolutions directly challenged also have the defect of annullability by reason of the form, since, being administrative acts of a general nature or, i.e., regulatory provisions, they should not have adopted the form of Resolutions, but of Orders *[Acuerdos]* as required by Article 118, Item 2, of the General Law of the Public Administration which states: "The [following] shall be issued by a Order; 1) . . . , 2) Any acts of a general nature issued in the exercise of the regulatory power. WHEREAS (2): The defendant in its reply to the

lawsuit claims the following: it accepts facts numbers 1, 2, 3 and 4 inasmuch as it is true that Resolutions Numbers 001-95, 030-95, 031-95 and 006-2000 were issued. In fact number six it rejects the first paragraph because of being contrary to law, since, even though it is true that the power to issue regulatory rules belongs in the Public Administration to the President of the Republic and that the Secretaries of State only authorize with their signature the regulations of the President, the challenged administrative acts are Resolutions and not Regulations so that the signature of the President is not required. These Resolutions were issued by the officials legally authorized by the Law to carry out this type of acts as stipulated by Article 122 of the Public Administration Law. It rejects the second paragraph of fact number six in view of the fact that the aforesaid acts are contemplated expressly in the current Fisheries Law; in addition, it rejects the third paragraph in view of the fact that the General Law of the Public Administration in Article 30, Item 8, thereof stipulates as a power of the Secretaries of State issuing Degrees and Resolutions in the matters under their competent jurisdiction and those as delegated to them by the President of the Republic, and seeing that they are implemented and, in the case of proceedings, the enforcement of the current Fisheries Law is the exclusive competency of the Secretariat of Agriculture and Livestock previously called Natural Resources. It rejects fact number seven as contrary to law, inasmuch as the Fisheries Law empowers the Secretariat of Agriculture and Livestock, previously called Natural Resources, to issue the Resolutions and any other measures deemed necessary for the greater efficacy of all of the fishing activities. It rejects fact number eight due to the fact that, although it is true that the Fisheries Law in Articles 5, 7, and 45 thereof, among others, set forth that regulations should be issued for the enforcement of the aforesaid law, it is also true that the Law says that the Secretariat of State may issue the appropriate Resolutions, so that, inasmuch as the plaintiff is against the Fishery Resolutions that have been issued under

the Fisheries Law and which are administrative acts of a general nature by means of which regulations have been imposed on the fishery business to attempt to prevent the elimination of the resources, this would be against what is being attempted to be regulated. It rejects the legal grounds invoked by the plaintiff. The explanation of the nature with which of the action under administrative law is deduced in the suit for absolute nullity of administrative acts in a general nature is totally rejected, since the plaintiff himself admits that the challenged acts are final acts, inasmuch as they were not appealed by the deadlines set forth by the Law. The Resolutions alluded to by the plaintiff's Attorney have been legally issued pursuant to the provisions of Article 122 of the General Law of the Public Administration and on the basis of the Fisheries Law contained in Decree 154 dated May 19, 1959. The administrative Resolutions represent the decision or disposition of the State to enforce legal provisions, inasmuch as the existence of Regulations is not necessary; it is sufficient for it to be based on a current law. An Administrative Resolution, since it is not regulations, does not require any delegation by the President of the Republic, even when he is the only one within the Central Public Administration to issue Regulations as such. The Fisheries Law states in Article 3 thereof all of the species of fish, crustaceans, mollusks, aquatic mammals and reptiles, marine plants and all other species that comprise the marine, lacustrine and fluvial flora and fauna are State property of common domain and public use. They may be fished, removed and used and traded freely by all Hondurans subject to the restrictions of this Law, the Regulations for its enforcement and other resolutions as stated, without the possibility of granting monopolies, auctions, lease contracts of any kind for fishing in all the waters of the sea, rivers, bays, harbors, coves, constructions, lagoons, lakes, canals, adjacent keys and islands, etc., or in part of them by any individual or entity involving privileges that violate the right to public property. The General Law of the Public

Administration in Article 10 thereof states that the following are organs of the Executive Branch: 1) the Presidency of the Republic, 2) the Council of Ministers and 3) the Secretariats of State. Article 11 of the same legal corpus sets forth that the President of the Republic is responsible for the supreme direction and coordination of the centralized and decentralized public administration. The current Fisheries Law in Article 5 thereof states that the Executive Branch by means of the Secretariat of natural resources, now Agriculture and Livestock, is the higher authority in matters of fisheries and matters related thereto; obviously, the resolutions do not necessarily have to be issued by the office holder of the Executive Branch, since the Secretariat of State in the Offices of Agriculture and Livestock, as a organ of the Executive Power, have sufficient legal powers to issue Resolutions and other measures it deems necessary for the better efficacy of all of the fishery activities as set forth in Articles 3, 5, 7, Items c), i), j). Likewise, the General Law of the Public Administration in Article 36, Item 9), thereof sets forth as common powers and duties of the Secretaries of State the issuing of Orders *[Acuerdos]* and Resolutions in the matters under their jurisdiction and those delegated to them by the President of the Republic and see to their enforcement. WHEREAS (3): the plaintiff filed the following exhibits: Documentary Exhibit No. 1, Documentary Exhibit No. 2, Documentary Exhibit No. 3, Communication Exhibit No. 4, Documentary Exhibit No. 6, Documentary Exhibit No. 7 and Exhibit No. 11 (Inspection by the Judge). WHEREAS (4): the facts alleged in the lawsuit were reliably proven as follows: on pages 66-67 of the proceedings that the Resolutions issued by the authorities of the Secretariat of Agriculture and Livestock are regulatory provisions in matters of fisheries, whose power to issue them lies solely with the Office Holder of the Executive Branch through the respective Secretariat of State; also authenticated in this exhibit are the alleged facts numbers 6 and 7 referring to the absolute nullity of the Resolutions, since the first two were

issued by the Secretary of State in the Office of Natural Resources and the Director General of Fisheries and the last ones by the Secretary of State in the Offices of Agriculture and Livestock and the Director General of Fisheries and Agriculture, with the countersignature of the Secretary General of the aforementioned Secretariat of State, without having competent jurisdiction to issue these regulatory rules, because the competent jurisdiction lies with the President of the Republic, pursuant to Article 245, Power 11, of the Constitution of the Republic and their nullity is set forth in Article 34 of the Administrative Procedure Law. Also, fact 7 of the lawsuit was proven, referring to the fact that these Resolutions also contain the defect of annullability by reason of form, since, inasmuch as they are administrative acts of a general nature, they should not have adopted the form of Resolutions but of Degrees, as required by Article 118, Item 2, of the General Law of Public Administration. With Exhibit Number 2 (see pages 66 and 67) in the opinion of the Bar Association of Honduras, it was proven that the aforementioned resolutions are regulatory provisions and the power to issue them lies with the Office Holder of the Executive Branch and also facts 6 and 7 of the lawsuit were authenticated; with documentary exhibit number 3 (see pages 70 and 76), consisting of the legal opinion of the attorney Ramiro Lozano, it is again proved that the power to issue the aforesaid Resolutions lies with the Office Holder of the Executive Power and, accordingly, when the authorities of the Secretariat of Agriculture and Livestock issue them, there is a manifest violation of the power of the President of the Republic. With Exhibit Number 4 (see pages 158 through 161), in the form of a Report of the Office of the Attorney General of the Republic, it was authenticated that the Secretary of Agriculture and Livestock did not send to issue an opinion the general regulations for the enforcement of the Fisheries Law or the drafts of the regulatory provisions of the aforementioned Law; and the Secretariat of Finance and the Secretary General of the Secretariat of State in the

Presidential Office gave an opinion in the same terms (see pages 138, 161, 163 through 165, respectively). Exhibit Number 6 submitted copies of the Official Journal *La Gaceta* Nos. 29,078, 29,081 and 29,082 in which there appear, as well as exist, hundreds of regulations, regulatory rules or provisions of a general scope issued by means of Orders of the President of the Republic through Article 245, Item 11, of the Constitution of the Republic. With Exhibit Number 7, it was authenticated that the Fisheries Law, Decree No. 154, of March 19, 1959, was never regulated and that in order to take the place of said regulations, Executive Orders and Ministerial Resolutions were issued. With Exhibit Number 11 (see page 154), it was authenticated that there are no Regulations of the Fisheries Law, but only resolutions issued by the Secretariat of State and the Director General of Fisheries and Agriculture. With all of this evidence, it was authenticated that the Resolutions which were issued by the Secretariat of State in the Office of Agriculture and Livestock to the regulate the Fisheries Law are null and void as a matter of taw because they were drawn up in violation of Article 245, Item 11, of the Constitution of the Republic. WHEREAS (5): although it is true the lawsuit is directed against resolutions that are final and are producing effects, the Law of the Jurisdiction of the Administrative Law in Article 32 thereof sets forth that a lawsuit under administrative law will be admitted against final acts and those confirmatory acts of final acts referred to by Item a) of Article 31 of the same law whenever they are null and void as a matter a law and are producing effects; but this is only for purposes of their annulment and future inapplicability, so that the action must be declared according to law. WHEREAS (6): the Administrative Procedure Law sets forth in Article 24 thereof that the acts will be issued respecting the procedures provided for in the legal code and, therefore, those acts in which a violation of the legal code is incurred are annullable and according to Article 34 of the same law in Item c) thereof issued acts, totally and absolutely regardless

of the procedure set forth, are null and void as a matter of law. THEREFORE: This Court of the First Instance of Administrative Law with jurisdiction in the Departments of Francisco Morazán, Comayagua, Intibuca, La Paz, Olancho, El Paraíso, Choluteca, Valle and Gracias a Dios, dispensing justice on behalf of the State of Honduras and pursuant to Articles 314, 318, 245, Power 11, and 248 of the Constitution of the Republic, 1, 11, 40 and 147 of the Law of the Organization and Powers of the Courts; 1, 2, 7, 9, 12, 13, 25, 26, 32, 42, 48, 78, 79, 81, 82, 95, 96, 129 and 134 of the Law of the Jurisdiction in Matters Under Administrative Law; 184, 185, 186, 187, 190, 191 and 192 of the Civil Procedure Code; 1, 24, 25, 34 and 35 of the Administrative Procedure Law; 1, 7, 8, 118, Item 2 of the General Law of the Public Administration; Official Letter No. 808J-3622-89 and Order No. 3-98 of the Honorable Supreme Court of Justice. RULES: First: To declare that the action is according to law, inasmuch as the challenged acts do not conform to law by virtue of having violated the legal code at the time they were issued. Second: the challenged Resolutions No. 001-95 of January 4, 1995, No. 030-95 of December 5, 1995, No. 031-97 of December 17, 1997, and No. 006-2000 of April 3, 2000, are entirely voided, but this is only for purposes of their annulment and future inapplicability: This Resolution does not confer any right to claims. AND ORDERS: that, if by the deadline, no appeal is filed against this decision, it becomes final, with a communication, issued with the stylistic insertions to the Secretary of State in the Offices of Agriculture and Livestock for him to implement this decision immediately by adopting whatever resolutions as may be according to law and enforcing the statements contained therein; no administrative file is being returned since it had not been submitted by virtue of the fact that this document did not exist inasmuch as the challenged acts were acts of a general nature. Because there were rational grounds for litigation, the party defeated

in the lawsuit is exempted from expenses. NO COST. LET NOTICE BE SERVED.
[illegible signature]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW JUDGE. Tegucigalpa, Honduras"]
[illegible signature]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW. Clerk. Tegucigalpa, Honduras."]
[illegible signature]
[New page:]
[Handwritten:] The City of Tegucigalpa M.D.C. on the twenty-fifth day of the month of May of the year two thousand one, the attorney Marco Antonio Lanza was notified of the decision rendered on the twenty-third day of May of the year two thousand one, signs with understanding at 10:20 a.m. [illegible signature]
[Rubber Stamp: "BAR ASSOCIATION OF HONDURAS. {ILLEGIBLE NUMBER} MARCO A. LANZA GÓMEZ".]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW. CLERK. TEGUCIGALPA, HONDURAS"]
In the city of Tegucigalpa M.D.C., on the twenty-eight day of the month of May of the year two thousand one, the attorney José Bernardo Torres C. has been notified of the decision dated the twenty-third day of the current year as above, signs with understanding and at the same time requests a copy of this decision it being 2:10 p.m. [illegible signature]
[Rubber Stamp: "BAR ASSOCIATION OF HONDURAS. 1893?507. JOSE BERNARDO TORRES AMANZOR".]
[illegible signature]
[Rubber stamp: "COURT OF THE FIRST INSTANCE OF ADMINISTRATIVE LAW. CLERK. TEGUCIGALPA, HONDURAS".]
[New page:]
[Handwritten:] May 25, 2001 10:30 p.m.

Notification by Table of Notices
Judge of the Court of First Instance of Administrative Law
I, Marco Antonio Lanza, acting in my capacity as Attorney for Mr. DAVID HENSON McNAB in the lawsuit that he has brought against the State of Honduras, the Secretariat of Agriculture and Livestock through the Attorney General of the Republic, so that the nullity and future inapplicability of some resolutions will be declared, respectfully come before you requesting that the ruling dated the twenty-third day of May of the current year be served by means of the Table of Notices of the Office on the Attorney for the defendant JOSE BERNARDO TORRES AMANZOR.
I ask Your Honor to admit this brief, process it according to law and rule in conformity.
Tegucigalpa, May 25, 2001.
[illegible signature]
[Rubber stamp: "BAR ASSOCIATION OF HONDURAS. {illegible number} MARCO A. LANZA GOMEZ"]

APPENDIX L

CERTIFICATION

The Undersigned Clerk of the Court of Appeals for Administrative Law, with jurisdiction at the national level, on today's date certifies: The judgment that literally states: **COURT OF APPEALS OF ADMINISTRATIVE MATTERS.** Tegucigalpa, Municipality of the Central District, on the eleventh day of October, two thousand one. **INASMUCH AS:** In order to hand down a final judgment in the appeal filed by **JOSÉ BERNARDO TORRES UMANZOR**, Esq., in his capacity as attorney for the State of Honduras, through the Secretariat of State in the Offices of Agriculture and Livestock, against the final judgment dated the twenty-third day of the month of May, located in Tegucigalpa, Municipality of the Central District, in the suit brought by MARÍA LETIZIA SUAZO DE GUILLÉN, Esq., in her capacity as attorney for Mr. DAVID HENSON McNAB, against the State of Honduras, through the Secretariat of State in the Offices of Agriculture and Livestock, retained to petition for the absolute nullity of acts of a general nature consisting of Resolutions No. 001-95 of January 4, 1995, No. 030-95 of December 5, 1995, No. 031-97 of December 17, 1997, and No. 006-2000 of April 3, 2000, because of a jurisdictional flaw in the exercise of the regulatory power conferred by the Constitution solely upon the President of the Republic in the Central Public Administration. This exhibit is recorded under Number **063-2001. THE PARTIES ARE: APPELLANT:** The State of Honduras, through the Secretariat of State in the Offices of Agriculture and Livestock, represented at Court by JOSÉ BERNARDO TORRES UMANZOR, Esq. **RESPONDENT:**

Mr. DAVID HENSON McNAB, represented at court by the Attorney MARCO ANTONIO LANZA LÓPEZ. The final judgment appealed is the one that states in its relative part: COURT OF FIRST INSTANCE IN ADMINISTRATIVE LAW. **Tegucigalpa, Municipality of the Central District, the twenty-third day of May, two thousand one.... DECISION: First: That the action is declared to be in order, inasmuch as the acts contested because of having violated the legal code when they were issued do not adhere to the Law. Second: Accordingly, the contested Resolutions No. 001-95 of January 4, 1995, No. 030-95 of December 5, 1995, No. 031-97 of December 17, 1997, and No. 06-2000 of April 3, 2000, are annulled in their entirety, but solely for purposes of their annulment and future inapplicability. This Resolution confers no right to claims. WITHOUT COST. NOTICE IS THUS SERVED. WHEREAS:** Pursuant to Articles 245, item 11, and 248, of the Constitution of the Republic, in order for regulations to have legal effect, they must be issued by the President of the Republic and authorized by the Secretaries of State in their respective areas or by the Under Secretaries as applicable. **WHEREAS:** The Jurisdiction in Administrative Law shall rule within the limits of the claims filed by the parties and the allegations inferred to lay the grounds for the action and the challenge. **WHEREAS**: It is incumbent upon the Courts of Law to enforce the laws in specific cases. **WHEREAS:** The final judgment against which appeal is filed, dated the twenty-third day of the month of May, two thousand one, handed down by the Court of First Instance in Administrative Law, located in Tegucigalpa, Municipality of the Central District, has been made compliant with the law, so that its confirmation is in order. **THEREFORE:** This Court of Appeals in Administrative Law, with jurisdiction at the national level, in the name of the State of Honduras, by a UNANIMOUS VOTE, with the Magistrate SAUL SUAZO LARA preparing the court's opinion, pursuant to Articles 303 and 304, Item c), and 134

of the Constitution of the Republic; 1, 2, Item a), 7, Item b), 9, 35, First paragraph, 89, 129, Item c) and 134 of the Law of Jurisdiction in Administrative Law. **RULES: FIRST:** The appeal filed is declared to be groundless. **SECOND:** The final judgment against which appeal was filed, handed down by the Court of First Instance in Administrative Law, located in Tegucigalpa, Municipality of the Central District, on the twenty-third day of the month of May, two thousand one, and which appears on folio number two hundred eight (208) to folio number two hundred eleven back (211b) of the first exhibit of proceedings, is **CONFIRMED AND ORDERS:** After this judgment becomes firm, that the appropriate certification be communicated to the Court from which it originated, so that it will proceed in conformity with the decision. WITHOUT COST. NOTICE IS THUS SERVED. **SIGNATURE AND SEAL.** FLORENTINO LÓPEZ MILLA. PRESIDING MAGISTRATING ACCORDING TO LAW. **SAÚL SUAZO LARA, REGULAR MAGISTRATE. PLUTARCO RIVERA CASTELLANOS, ALTERNATIVE MAGISTRATE. HUMBERTO OCHOA OCHOA, CLERK.**

Issued in the City of Tegucigalpa, Municipality of the Central District, on the fifteenth day of the month of October, two thousand one.

[Rubber stamp with a coat-of-arms in the center, reading: "COURT OF APPEALS IN ADMINISTRATIVE LAW, Tegucigalpa, Honduras".]

[illegible signature]

HUMBERTO OCHOA OCHOA

Clerk

APPENDIX M

THE GAZETTE

Official Newspaper of the Republic of Honduras

DEAN OF THE HONDURAN PRESS

Editor: Reporter Olman Ernesto Serrrano

No. 002003

YEAR CXVII TEGUCIGALPA, M. D. C. HONDURAS,
WEDNESDAY APRIL. 7. 1993 No. 27016

PRESIDENCY OF THE REPUBLIC

NATURAL RESOURCES
AGREEMENT No. 0008-93
TEGUCIGALPA, M. D. C. January 13, 1993

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* * *

CHAPTER VIII

OF THE FREEZING, STORING AND DEFROSTING OF THE PRODUCTS

Article 48.—For the freezing of the products it will be observed:

a) That the product is fresh and of good quality.

b) When methods of fast freezing are used the final product must not show signs of deformity, cracking, contusions and beatings.

c) When belt conveyers are used for transfer of the product in the freezers, it is necessary to adjust the speed of these in a way that the product is adequately frozen when it arrives to the other extreme of the freezing chamber.

d) The freezing can only be made in the freezing chamber.

e) During the freezing all kind of deformation of the blocks or containers must be avoided.

Article 49.—For the icing and packaging of the products it will be observed:

a) The frozen products must be iced, wrapped or packed to protect their quality during storing and commercialization for export as well as for internal consumption.

b) The products that are not packed, nor wrapped must be iced down after being taken out from the freezer.

c) Consider the icing process for shrimp an exception, which must be done prior to freezing.

d) For shrimp double icing no larger than 1/4" is permitted, placing later the product into individual packaging.

e) The temperature of the solutions (chlorinated water at 5 ppm must be used) used for the icing must not be higher than 5 C (five degrees centigrade).

f) The frozen products must be moved immediately to the storage chambers after being removed from the freezing chambers or from the icing.

g) The products in storage must be periodically examined to see that they have not suffered alterations.

h) The packaging must be made in boxes with the appropriate label, treated with paraffin and the size must have been approved during the registration process. They must have the following legend:

1st.—The name or trade name of the business that manufactured the product.

2nd.—The weight.

3d.—The legend "Product of Honduras" that can be also placed in another language.

4th.—A 3 (three) centimeter circle, "Inspected and Approved by the Department of Natural Resources of Honduras" and the number assigned to the establishment doing the processing.

5th.—In addition, it can have printed the different denominations of the size of the product.

i) The individual boxes can be crated in containers that have a minimum of 10 (ten) individual boxes, This crates must have the same information than the individual boxes.

* * *

CHAPTER XIX

OF THE SANCTIONS

Article 116.—The infractions to the present regulations will be classified as light, less serious and serious fault.

Article 117.—Are considered light faults:

a) To be found for the first time, during the supervision with non compliance of up to two Articles of this Regulation that are not considered in the group of serious faults.

* * *

Article 120.—The fines applied for infraction of light faults are:

a) Written warning.

Article 121.—The fines applied for infraction of less serious faults are:

a) Written warning and the payment of 2,000 Lps. (two thousand lempiras).

APPENDIX N

DECREE No. 154

THE NATIONAL CONGRESS
DECREES:

THE FOLLOWING FISHERIES LAW

CHAPTER VIII

CRIMINAL PROVISIONS

* * * *

Article 70—The following offenses shall be punished with [a fine of] THREE HUNDRED LEMPIRAS or THREE HUNDRED DAYS imprisonment:

1) Those who use [any of the following] for fishing: dynamite, gunpowder, explosives, carbides, sulfur, line or chemical salts of any kind.

2) Those who throw must, junk, syrups, acids, industrial wastes or minerals, drainage from the manufacture of rigging or rope, leather processing plants, leather tanneries, distilleries, stills into the ocean, rivers, streams, lakes, lagoons, or allowing them to run or filter to those places or to channel to them in any way, or who wash the tanks of steamships or oil tankers, oil processors, syrup processors, or who throw ashes

or garbage into bays, harbors, etc. or places less than five miles from the coast.

3) Those who destroy or harvest the eggs, or the offspring of fish, chelonians or other aquatic species for profit.

* * *

APPENDIX O

STATE OFFICE OF THE DEPARTMENT OF NATURAL RESOURCES

REPUBLIC OF HONDURAS

From the desk of the Secretary

RESOLUTION N. 030-95

The Department of Natural Resources and the Department of Fishing and Aquiculture.

CONSIDERING: That the protection and preservation of Natural Resources is the duty of the State and an unavoidable obligation of all citizens.

CONSIDERING: That the Executive Power through the Department of Natural Resources and its specialized departments, is the principal authority in issues dealing with fishing activities and any other activity related to it.

CONSIDERING: Catching fish, shrimp, lobster and snails in the Atlantic Ocean is very important for the national economy.

CONSIDERING: The establishment of closed seasons is a very important mechanism for the survival of species and will also create an ecological equilibrium.

THEREFORE

Using its authority and the application of Articles I, 5, 2nd numeral, and literal 7 "g"of the Fishing Law.

RESOLVES:

First To establish a closed season every year when dealing with shrimp, lobster and snails and related species in the Atlantic Ocean and in any waterways along the coast during the following dates::

a) Shrimp from the 1st of February to the 30th of June.

b) Lobster from the 16th of March to the 31st of July.

c) Snails from the 16th of March to the 30th of August.

Second: All dragging nets used by shrimp boats must carry the device for the exclusion of turtles (TDE), to guarantee the survival of this species.

Third: For the capture of lobster.

a) the traps will be made of wooden slats, except the top and bottom which will be one solid piece. The space between slats and the bottom must be at least 2 and 1/4 inches.

b) Fishing boats which engage in diving activities should have the right diving equipment such as pressure gauges, oxygen tanks, regulators, masks, fins, everything in excellent condition, as well as the compressors and filters, all should be

in excellent condition before setting out to sea.

c) Captains of diving boats will take a required course "Security regulations for Diving and the Environment" just before the beginning of each fishing year.

d) The minimum size to keep a lobster should be 5.5 inches or 14.5 centimeters of abdominal length.

e) The devices to measure the length of lobsters are obligatory on each vessel which carry out this fishing activity.

Fourth: The minimum size to keep snails (Strombus gigas) is 22 centimeters from the posterior channel to the siphonal channel.

Fifth: Infractions of the present Law will carry out a penalty as stipulated by the Fishing Law.

Sixth: This Resolution must be made public.

Tegucigalpa, Central District Municipality, the 5th of December of 1995.

LET IT BE KNOWN

RESOLUTION N. 030-95

RAMON VILLEDA BERMUDES
Minister

MARCO POLO MICHELETTI
General Director of DIGEPESCA

APPENDIX P

GENERAL LAW OFFICE OF THE REPUBLIC
REPUBLIC OF HONDURAS

LEGAL OPINION

The Undersigned, Attorney General emits legal opinion in relation to the inquiry based on the Article 80 of the Constitution of the Republic that was brought to this institution by the Attorney Maria Leticia Suazo de Guillén, registered in the Bar Association with number 5385, representing the society **CARIBEAN FISHERY CO S. DE R.L.** of the address of French Harbour, Roatan, Bay Islands. The purpose of this legal opinion is to determine A) If they are "laws" or they have the character of "laws"; B) If the resolution no. 003, issued the 31 of March of 1980 by the General Direction of Natural Resources; as well as the resolution no. 030-95 issued the 5 of December of 1995 by the titleholder of the mentioned entity (Today called Natural Resources and Environment) and the General Direction of Fishing and Aquiculture, are "regulations."

As following, I give answer to the inquiry in the following form:

A) Are they laws or have the character of "laws" the Resolutions no. 003 of the 31 of March of 1980 and no. 030-95 of the 5 of December of 1995?

The ability "to create, decree, interpret, reform, or revoke the laws" in Honduras corresponds solely to the National

Congress, according to the Article 205, numeral 1 of the constitution of the Republic, for which the established legislative process must be fulfilled as it is written in Title V, Chapter II, Articles 213 to the 221 of the own Constitution.

Consequently, because the Resolutions were not issued by the National Congress and Because they did not fulfilled the process of formation, sanction, and promulgation of all laws, the Resolutions numbers 003 and 030-95 are not "laws" in the constitutional and legal concept nor have character, effectiveness or force of laws, therefore, if they were applied like laws, the actions would be of absolute invalidity expressed constitutional dispositions have been violated.

B) Are "Regulations" the Resolutions numbers 003 issued the 31 of March of 1980 and 003-95 issued the 5 of December of 1995?

1) Resolution no. 003 of the 31 of March of 1980 was issued when the Code of Administrative Procedures of the 5 of April of 1930 was in operation. Under such Code, the Executive Power, the independent institutions and the municipalities issued as "Agreements" and never as "Resolutions" the regulations. These decisions are reserved to be taken in the administrative files in which the individuals take part.

On the other hand the Agreements that the regulations contained, as an act of protocol, must be published in the official Newspaper "La Gaceta" in order to come into operation. This requirement was not met by the Resolution n. 003 of the 31 of March of 1980.

In addition to Article 45 of the Fishing Law (Legislative Decree no. 154 of 19 of March of 1959), the fishing instruments, legal measures of the

captured species, and seasons of prohibitions will be subjected to the regulations of the related law. Article 5 establishes that the Executive Power (President of the Republic), through the Secretary of Natural Resources, is the superior authority in the matter of fishing and its connections, therefore it can establish and dictate measures through regulations.

In summary, the referred Resolution does not have a legal sense, because it does not represent any form of "Agreement", it was not published in the Gaceta, neither it was issued by the President of the Republic, through the Minister of Natural Resources. The document has, besides absolute invalidity, absolute incompetence because an incompetent authority issued it.

2) Resolution no. 030-95 of the 5 of December of 1995 was issued when the General Law of the Public Administration was already in use, in whose Article 120 it is established that the decisions that are taken in order to conclude the procedure in which the individuals, who represent the interested party, had intervened "will adopt the form of Resolutions. In addition article 118 of the mentioned law disposes that "they will be issued by an Agreement 1) . . . . 2) The acts of a general character that could be dictated when exercising the regulative power".

And even though Resolution no. 030-95 was unnecessarily published in the Official Newspaper La Gaceta, it lacks the requirement of the form of the Agreement as it must have been issued if the intention of the authority was to dictate acts of general character in exercising the regulative power, which, does not correspond to the titleholder of the Secretary of Natural Resources representing the General

Direction of Fishing and Aquiculture but to the President of the Republic through the Titleholder of this Secretary, according to what is stipulated in Articles 5 and 45 of the Fishing Law, reason why in the assumption to consider regulative norms, it would lack not only form but efficiency of the authorities that issued them and therefore invalidity of these regulations is produced.

Tegucigalpa, M.D.C., 24 of July, 2000

Seal and Signature
Attorney Hector Ramon Trochez
General Attorney of the Republic

APPENDIX Q

IN THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15147-33

UNITED STATES OF AMERICA

Plaintiff/Appellee,

Vs.

DAVID HENSON McNAB, ET AL.,

Defendant/Appellant

DECLARATION BY SERGIO ZAVALA LEIVA ATTORNEY GENERAL OF THE REPUBLIC OF HONDURAS

1. I am the Attorney General of the Republic of Honduras and, as such, my responsibilities include the enforcement and protection of the Law of Honduras. According to Article 228 of the Constitution of the Republic, I am the Legal Representative of the State of Honduras and, as such, empowered to issue this opinion ["dictamen"].

2. The Government of the Republic of Honduras is not a common law ["jurisdicción consuetudinaria"] country. Honduras is a constitutional Republic, whose

codified and written continental legal system comprises numerous guarantees and guaranteed rights that protect due process.

According to Article 315 of the Constitution of the Republic of Honduras. the Constitution is the Supreme Law of the Republic.

The legal structure of Honduras is as follows: the Constitution of the Republic, International Treaties ratified by Honduras, the Laws (Statutes), the Regulations, Administrative Jurisprudence and the General Principles of Law[55].

The Constitution of the Republic is decreed and sanctioned by the National Constituent Assembly. The National Congress has the sole prerogative for ratifying international treaties, as well as creating, decreeing, interpreting and revoking laws (statutes). The Constitution also confers upon the officeholder of the Executive Branch the power to issue regulations, which, in turn, acquire force of law.

Regulations (which must be issued in the form of *Acuerdos*[56]) [Translator's Note: Since *Acuerdo* can be rendered "agreement," "decision" and "accord" and in this context defies a one-word translation into English, hereinafter it will be left in Spanish in italics] are general rules of conduct applicable to all those who may be affected thereby.

The Constitution empowers the President of the Republic to issue Regulations (Article 245, Item 11), and he

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[55] Article 7 of the General Law of Public Administration.

[56] Article 118, Item 2, of the General Law of Public Administration.

is the only person expressly empowered by the law to do so[57]. The Constitution also sets forth that, in order for the regulations to have legal effect, they must be authorized by the appropriate Secretaries of State (Article 248).

Both the Laws and the Regulations become effective when they have been validly issued and published in *La Gaceta*, which is the equivalent in Honduras to the *Federal Register* of the United States.

Other actions taken by the Administration in Honduras are those called "Resolutions," which are actions to enforce the laws and regulations; accordingly, resolutions are administrative or judicial decisions that are designed to conclude a procedure or dispute in which a concerned party takes action that is within the jurisdiction of the government office that issues it or else in the jurisdiction of the court. Judicial resolutions are also called judgments.

The judicial system of Honduras includes the Courts of First Instance of Administrative Affairs, which are responsible for resolving disputes related to administrative matters. A decision by a Court of Administrative Affairs can be appealed to the Court of Appeals of Administrative Affairs.

3. There are cases in which the meaning and the interpretation of the laws of Honduras become important for other countries and foreign states. An example is the case that concerns us, in which the enforcement of the so-called "Lacey Act" makes a person or an entity either civilly or

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[57] The Constitution sets forth that the powers of the functionaries are "by express text" and not tacit, i.e., that it requires the actions of the functionaries to have been previously authorized in a law in order for them to be able to carry them out. *"(Article 321—The servants of the State have only those powers that are expressly conferred upon them by the law. Any act performed by them outside of the law is null and void and entails liability)."*

criminally liable under the laws of the United States if it is shown that the party has violated the laws of Honduras.

4. In Honduras, to determine whether a person or an entity has violated a certain Law, not only the allegedly violated law must be considered, but also the existing legal framework together with the rights and guarantees set forth by the Law. Likewise, there are General Principles of Law that must be considered, since they are an integral part of the laws and that are the product of the evolution of Law in Honduras and which must be considered. For this reason, the Constitution in Article 90 thereof states that: *"No one can be judged except by a judge or court of competent jurisdiction with the formalities, laws and guarantees set forth by the Law."* (Emphasis added). This is a manifestation of the codified and written continental legal system that governs in Honduras.

In our system, ignoring the legal context, formalities, existing legal rights and guarantees would be a violation of the guarantee of judicial protection, which grants the accused the right to make use of any effective resource that protects him against acts that violate his fundamental rights as recognized in the Constitution, in International Treaties and in the Law and, therefore, a serious violation of due process.

5. The Constitution sets forth that any person or entity is entitled to submit petitions to the authorities whether for reasons of private or general interest, as well as obtain a prompt reply by the legal deadline (Article 80). To do so, the Law of Administrative Procedure sets forth a procedure to be followed within the administration, designed to guarantee, to the extent possible, that the final product is, legally correct.

The procedure in the case of a petition of an interested party to the administration is initiated by means of a brief addressed to the body empowered to resolve the

matter. The body with competent jurisdiction to decide [the issue] will request the mandatory and optional reports and opinions ["dictámenes"] from the consulting bodies. In all cases, it is necessary for an opinion ["dictamen"] of the Legal Department to be requested before issuing the resolution. The procedure initiated with the petition will end with the Resolution, in which all of the issues posed by the concerned parties and any resulting from the case will be decided.[58]

Based on the principle that the powers of the functionaries are "by express text,"[59] only those functionaries upon whom the laws confer powers to issue resolutions can validly issue documents that contain the opinion ["opinion"] of the body they represent.

The Constitution of the Republic states that the Executive Power is exercised by the President of the Republic (Article 235). The President of the Republic is responsible for the supreme direction and coordination of the Public Administration (Article 11, General Law of Public Administration) and has the power to resolve matters (Article 245, Item 11 of the Constitution).

The Secretaries of State (also known as "Ministers") are the direct collaborators of the President of the Republic in the corresponding Office (Article 247 of the Constitution, Article 33 of the General Law of Public Administration). The Ministers are empowered to issue resolutions in matters falling under their jurisdiction[60].

The Under Secretaries of State (also known as Vice-Ministers) are the direct collaborators of the Secretary of

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[58] Articles 61, 72, 83 of the General Law of Administrative Procedure.

[59] *See* footnote no. 3.

[60] Article 36, Item 8, of the General Law of Public Administration.

State and the ones who may assume the functions of a Secretary of State by Law in those cases provided for. They also decide in those matters delegated to them by the Minister.[61]

The General Directorates, which are departments designed for the execution of specific programs and projects, are also part of the Secretariats of State. The person in charge of them also has the power to rule on matters falling under his jurisdiction.[62]

Another organ of the Secretariat of State, which, unfortunately, to the detriment of the accused, has had great significance in the case that concerns us because its involvement has been considered "critical" in the decisions made by the Court of Alabama is the General Secretariat, which is nothing more than the instrument of communication for the Secretariat of State. Its officeholders have certification duties.

The functions of the General Secretariat, pursuant to Articles 27 and 28 of the Regulations of the Organization, Operation and Jurisdiction of the Executive Branch, are limited to the following: receiving requests, and petitions and registering them appropriately; seeing that the matters are processed by the established deadlines; keeping a record of the decrees and *acuerdos* issued in relevant matters; keeping a record of the official correspondence and sending it to the appropriate party; keeping the General Archive of the Office; authorizing the signature of the Secretary of State or the Under Secretary and those measures, decisions or resolutions issued by them; notifying the concerned parties of the

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[61] Article 36, Item 19, of the General Law of Public Administration.

[62] Article 30 of the Regulations of the Organization, Operation and Jurisdiction of the Executive Branch issued to enforce the General Law of Public Administration.

provisions or resolutions; transmitting to the concerned parties the decisions issued on relevant matters; coordinating and supervising legal services, i.e., assigning the case files to the different legal advisors and exercising oversight to see that the steps are carried out in order. It is also responsible for institutional communication and management services of external cooperation.

The Secretary General is not authorized to resolve any type of process, except in those matters expressly delegated to him by the Minister through a Delegation *Acuerdo* that meets all of the requirements set forth by the Law and it is required that his resolution be part of a pre-existing procedure.

As stated in the powers of the aforementioned General Secretariat, its officeholder does not issue legal opinions ["opiniones o dictámenes"] at any time, either within the internal proceedings of the Ministry or much less so for outside the Institution. This would violate the Honduran legal structure.

The opinions ["dictámenes u opiniones"] issued by the advisory organs of the Ministry, such as the legal and technical departments, are solely for internal use and their purpose is to inform the officeholder of the body of the administration on the matter it is going to resolve. They have no outward legal effects, because these advisory organs cannot issue opinions ["dictámenes u opiniones"] outside of the internal proceedings that so require them. To do so would be totally irregular and illegal under the laws of Honduras.

The fact that functionaries without competent jurisdiction have participated in an irregular manner in this criminal process is something so serious for the Law of Honduras that even the Secretary of State for Agriculture and

Livestock has had to intervene to disqualify this participation, which has been defined by the Human Rights Commissioner, in his report, as a violation of the accused's Human Rights.

6. Unfortunately, most of the documents that were used by the Court to inform itself about the proper interpretation of the Law of Honduras, which documents were furnished by the Department of Justice of the United States[63], present, among other things, some of the following problems: 1) They come from functionaries without powers to issue them;[64] 2) They failed to follow the procedure set forth in the laws of Honduras; and 3) They were misrepresented before the Court of the United States, since, under the laws of Honduras, they do not have legal effect because they do not express the will of the State.

In Honduras, this type of violations of the law is seen as a violation of Due Process. Had the appropriate procedures been followed, the most likely thing is that the Court would have seen the facts with greater clarity and would not have had the difficulties that gave rise to an erroneous interpretation of the Law of Honduras, which would have been shown that the violations alleged in the case did not exist.

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[63] Some documents presented to the court were obtained from the Office of the Public Prosecutor by the Economic Advisor of the Embassy of the United States in Honduras which confuses even more the "procedure" that the Department of Justice of the United States followed to obtain its evidence.

[64] Examples: a) Secretary General and some legal advisors of the Ministry of Agriculture and Livestock; b) Documents of the Office of the Public Prosecutor in charge "of the investigation of crimes and the exercise of public criminal action" (Law of the Office of the Public Prosecutor) when a violation of the Fisheries Law is not subject to criminal prosecution since it is merely administrative.

7. The basis for the allegations against the accused is that they have violated the following: (1) Resolution 030-95, in relation to the limit on the size of the lobsters; (2) *Acuerdo* 0008-93; with regard to rules of hygiene for seafood products, and (3) Article 70. Item 3 of the Fisheries Law of 1959, in relation to aquatic species with eggs.

8. **Resolution 030-95**. This Resolution, which, inasmuch as its contents are no more than Regulations issued in an incorrect form,[65] was declared null and void *ab initio* and without legal force or effect, due to the fact that it was not issued according to the Constitution and the Laws of Honduras. For this reason, it cannot nor should be the grounds for determining the existence of a violation of the Law of Honduras in this case.

The nullity *ab initio* of Resolution 030-95, among others, was determined in the judgment of the Judge of Administrative Affairs (May 23, 2001). This decision was confirmed by the Court of Appeals of Administrative Affairs (October 11, 2001).[66] Both judgments of the Courts of

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[65] Because of its regulatory content, it should have been issued by in the form of an *Acuerdo* and not as a Resolution, since it is not a decision that settles any dispute or procedure.

[66] It should be mentioned that the reasons set forth by the Department of Justice of United States for disagreeing with the decision of the Court of Administrative Affairs (Govt. Br. page 31, footnote 12) denote a lack of clarity they have with regard to the Law of Honduras and show the injustice committed. (1) The Courts of Administrative Affairs have at no time said that the President can issue administrative *resolutions*. As we have mentioned, there are several functionaries with the power to rule on matters in their jurisdiction within the administration. The President has the sole power to issue regulations, i.e., general rules of conduct. (2) The Department of Justice of the United States apparently still does not understand the difference between a Resolution and Regulations. Resolutions must be limited to conclude (resolve) a procedure in which a private party takes action as a concerned party (Article 20, General Law of Public

Administrative Affairs have been recognized by the Secretary of State in the Offices of Agriculture and Livestock as being of binding compliance and final, who also recognizes that Resolution 030-95 is null and void *ab initio* and that it is not a representation of the Law of Honduras.

The Court of Administrative Affairs included language in its judgment stating that the annulment of Resolution 030-95 (and other resolutions) was "only for purposes of its annulment and future inapplicability: This Resolution does not confer rights for claims." This language has led the Department of Justice of United States to assert that the decisions of the Courts of Administrative Affairs have no impact on the prosecution pending in this case. The position of the Department of Justice in this regard is incorrect, since these decisions are of binding compliance.

The judgments of the Courts of Administrative Law clearly set forth that Resolution 030-95 is null and void, but they also clearly state that it can no longer be enforced as of the date or which these decisions become final. This is explained in the following way: 1) **Annulment**: That the assumption of the validity of Resolution 030-95 ceased to exist and that, therefore, it is officially nonexistent for any persons who could have been affected by it; and 2) **Future Inapplicability**: That Resolution 030-95 can no longer be applied in any Administrative or Judicial proceeding, including all of those proceedings awaiting a final resolution; No individual or entity can be sanctioned for failing to

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Administration) and the Regulations are the acts of a general nature or general rules of conduct applicable to all those who may be affected thereby. The Resolutions annulled by the Courts of Administrative Law were general rules of conduct and not decisions that resolved a given conflict; therefore, they were treated by these courts as *Regulations* and not as *Resolutions*, also clarifying the violation of the Law by the existing defect in form by calling them Resolutions and not *Acuerdos* as was appropriate.

comply with it, even when it is shown that the violation occurred before being declared null and void, because the resolution is null and void.

It is important to stress the clarity with which the Court of Appeals of Administrative Affairs sets forth the nullity *ab initio* of the resolutions, by stating that if the regulations are not issued by the President of the Republic and authorized by the Minister of the [appropriate] Sector, they would never have had legal effect.

The reason that the laws of Honduras and, in particular, the Court for Administrative Appeals, with its specific language in its judgment, only set forth its future inapplicability is to guarantee the legal security of the State, protecting it from any damages and losses that could have been caused by the enforcement of an act that is null and void as a matter of law. This means that final cases in which the annulled rules were enforced while they were still assumed to be valid cannot be reopened.[67]

The fact that certain situations are guaranteed for the protection of the State and society has no effect on the type of nullity. This is explained in the following manner: The Resolutions were annulled *ab initio*, i.e., it is considered that the Resolutions were never laws of Honduras but the effects of the decision are *ex tunc*, i.e., it does not affect final administrative cases, only those that are still pending at the time of the judgment.

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[67] An exception to this rule would be in the criminal context: in criminal trials in which a final condemnatory judgment is imposed based on the application of an administrative act that is null and void as a matter of law, the constitutional guarantee of the retroactivity of the law to the benefit of the delinquent is applicable (Article 96).

It should be added that, under the laws of Honduras,[68] if an attempt had been made to sanction the accused for failure to comply with Resolution 030-95, the defendant could have made use of the resources and guarantees that the Law conferred upon him, claiming nullity as a matter of law of the act during the trial. If the Court were in agreement with this and declared the Resolution to be null and void, the defendant would not have been sanctioned, even when there existed an assumption of validity of the Resolution until it was declared null and void.

The judgments of the Courts of Administrative Affairs have a decisive impact in the prosecution pending in this case for the following reasons: 1) The nullity of Resolution 030-95 is *ab initio*, i.e., it was never the Law of Honduras; 2) the judgment of the Courts of Administrative Affairs prevents any court from continuing to enforce 030-95 in any pending case awaiting final resolution, such as in the case that concerns us; 3) the judgment of the Courts of Administrative Affairs confirms that, if the accused had been put on trial in Honduras for violating Resolution 030-95, he would have been able to demonstrate his innocence, since this Resolution was null and void.

9. ***Acuerdo* 0008-93.** The purpose of the Regulations (equivalent to an Administrative Regulation of the United States) contained in *Acuerdo* 0008-93 was to state the hygienic and sanitary inspection rules for seafood products. It was issued to implement Decree No. 40 (which is equivalent to a "statute" of the United States), dated May 16, 1973. This Decree was expressly repealed by Article 42 of Decree No. 157-94, which went into effect on January 13, 1995, and, therefore, it had no validity during the time in which the lobsters involved in this case were caught.

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[68] Law of the Jurisdiction of Administrative Affairs (Article 30), among others.

The repeal of Decree No. 40 has the effect, under Honduran Law, of repealing all of those regulations promulgated under this Decree, including *Acuerdo* 0008-93. This longstanding principle of law, both in Honduras and in most legal systems, has been precisely reiterated by the National Congress in its interpretation of Article 43 of the Civil Code, issued by means of Decree 198-2001, which, in its relevant part, states literally:

> ". . . the total or partial express repeal of a law leaves without legal value or effect the general regulations and the specific regulations in toto, or in that part referring to the reformed article or articles when the reform is partial, that the Executive Branch, through the Secretariat of State, has issued to implement the provisions of the repealed Law . . . ."

In Honduras, the interpretive laws are part of the interpreted laws. Thus, they are considered applicable from the date of the interpreted laws.

Therefore, the Regulation contained in *Acuerdo* 0008-93 had no legal validity or force during the relevant period of time in this case.

10. **Article 70 of the Fisheries Law**: Similarly, Article 70, Item 3, as it appeared in Decree 157 of the Fisheries Law of 1959, which has been considered as a Law of Honduras that has been violated, in this case was specifically repealed by Decree 245-2000, which went into effect on February 5, 2001, and which replaced Article 70 in its entirety, with a new and amended Article 70. Therefore, the original Article, under Honduran Law, ceased to be valid and to have legal effect when its reform went into effect. The new Article 70, adopted by Decree 245-2000, contains no prohibition related to the eggs of aquatic species.

The same Secretary of State in the Offices of Agriculture and Livestock, as the superior authority in this matter, clearly states in his Resolution that the reform contained in Decree 245-2000 left invalid and without legal effect the previous provision contained in Article 70, Item 3, of the Fisheries Law of 1959, and that, under Article 96 of the Constitution of Honduras, the repeal of Article 70, Item 3, has retroactive effect to the benefit of those accused in the pending criminal charges.

It should be stressed that Article 70, Item 3, of the Fisheries Law of 1959 was duly interpreted by the corresponding authorities interpreted it[69] in the following manner: This article prohibited the destruction or collection of the eggs or the spawn of the aquatic species but not the destruction or collection of the egg-bearing species.

This interpretation has logical support, since it cannot be thought that this article prohibited the collection of all the egg-bearing aquatic species, due to the fact that this would include species such as shrimp and fish, among others, which is not only unnecessary but commercially impossible to comply with and, in addition, would do tremendous harm to the economy of the country.

Therefore, Article 70, Item 3, of the Fisheries Law ceased to have legal validity when it was repealed, which, when applied retroactively, causes the related article to be unenforceable in the case; in addition, it never penalized the conduct supposedly imputed to the accused.

11. **Reference to the involvement of the "amici curiae"**: The concept of the *amici curiae* is a novel and revolutionary element in international law by empowering or authorizing any concerned person to submit his written

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[69] As substantiated in the Statement of the General Directorate of Fisheries and Aquaculture.

opinion on items submitted for discussion; in fact, in the Inter-American system, this concept has had a notable development with the involvement of even non-governmental organizations in the hearings held by the Inter-American Court of Human Rights.

[illegible signature]

SERGIO ZAVALA LEIVA

Attorney General of the Republic

[Rubber stamp: "OFFICE OF THE ATTORNEY GENERAL OF THE REPUBLIC. {coat-of-arms} ATTORNEY. HONDURAS, CENTRAL AMERICA".]

APPENDIX R

SAG **SECRETARIAT OF AGRICULTURE AND LIVESTOCK**

By producing more, we will preserve peace

Secretariat of State in the Offices of Agriculture and Livestock, Tegucigalpa, Municipality of the Central District, on the fifteenth day of the month of November of the year two thousand one.

CONSIDERING: In order to act on the Special Report with Recommendations, issued by the National Human Rights Commissioner, on the eighth day of November of the year two thousand one, related to the complaint filed by Mr. Steven Guillén, acting on behalf of Mr. David Henson McNab before the aforementioned Commissioner, because of considering that the Affidavit given by Liliana Paz P., Esq., on the tenth day of August of the year two thousand one, contains legal errors.

WHEREAS the Legal Department of this Secretariat of State, after reviewing the facts alleged in the related report, considering in addition the decisions of the Courts of Administrative Law related to the case and after having made the relevant consultations, is of the opinion that what is set forth by the National Human Rights Commissioner in his report and in his Recommendations, is totally correct, so that it was of the opinion that the aforementioned recommendations be adopted, as well as the appropriate corrective measures;

WHEREAS, in the Affidavit given by Paz P., Esq., in her capacity as Secretary General of this Secretariat, an error of law was incurred, according to the examination the National Human Rights Commissioner made of the matter, based on the nation's laws and on international conventions and treaties signed and ratified by the Republic of Honduras;

WHEREAS, according to Article 43 of the Organizational Law of the Human Rights Commissioner, this Secretariat of State is obligated to respond in writing to the Commission with whatever is relevant with regard to the Special Report with Recommendations issued by that national institution in charge of guaranteeing the effectiveness of the rights and freedoms recognized in the Constitution of the Republic and the International Treaties and Agreements ratified by Honduras;

WHEREAS there are grounds for issuing the corresponding Resolution to give the answer required by the Law to the Recommendations of the National Human Rights Commissioner and to take the corrective measures under Law.

Therefore,

HE RESOLVES:

FIRST: On the basis of the Special Report and Recommendations of the National Human Rights Commissioner, to disqualify as an error of law the Affidavit given by Liliana Paz P., Esq., on the tenth day of August of the year two thousand one, as well as any other statement contrary to what is set forth in this Resolution, inasmuch as it contradicts the Constitution of the Republic, the laws of the country, the international treaties and conventions and the principles of law.

SECOND: That the official position of this Secretariat of State, as well as the correct sense and scope of the challenged rules, is that set forth below:

1) **Resolution 030-95.** According to a decision of the Court of Administrative Law dated May 23, 2001, Resolution 030-95 and other resolutions were totally rendered null and void, but only for the purposes of making them null and void and inapplicable in the future. However, the final and firm judgment of the Appeals Court of that same Court dated October 11, 2001, expands the ruling by determining that the contested Resolutions are null and void and, therefore, do not produce legal effects because of having been issued by an authority without jurisdiction erroneously and beyond the powers that the law grants to the issuer thereof. This is owing to the fact that they contain regulations and, since they had not been issued by the President of the Republic and authorized by the corresponding Secretary of State, **they never had the force of law** pursuant to what is set forth in the Constitution of the Republic, Articles 245, Number 11, and 248.

   The aforementioned decision of the Court of Administrative Law has a retroactive effect in criminal matters pursuant to the Constitution of the Republic in Article 96 thereof, since it does not require the legal rule to be criminal in order for it to be retroactive, since it is sufficient for it to favor the criminal or defendant in order for it to be applied in any criminal matter, as is in the case of Mr. McNab.

2) **Decision ["Acuerdo"] 0008-93:** Pursuant to the Legal Principles of Law, confirmed by Decree No. 198-2001, recently issued by the National Congress, the express repeal of a law makes the regulations

issued by the Executive Branch to enforce the repealed law without value or effect, unless there is an express provision in the repealing law. Therefore, Decision ["Acuerdo"] 0008-93, issued to enforce the Meat Industrialization (Executive Decree No. 40 of May 16, 1973) was repealed in its entirety and rendered without any value or legal effect as of January 13, 1995, when the Plant and Animal Health Law went into effect (Decree 157-94), which repeals the aforesaid Meat Industrialization Law.

3) **Article 70 of the Fisheries Law:** This article, as amended by a Decree of the National Congress No. 245-2000, rendered invalid and without legal effect the provisions originally contained in said article. Therefore, those provisions that were part of the original article and which were omitted in its amendment, ceased to have legal validity when Decree 245-2000 went into effect, among them, those contained in Items 3 and 7 of the original Article 70. Since those omissions benefit the defendant, their retroactive application in the criminal case brought against Mr. McNab is likewise guaranteed by Article 96 of the Constitution.

THIRD: Communicate to the officials of this Secretariat of State, by means of a circular, that rules not in effect must not be enforced nor must they alter the meaning and scope thereof;

FOURTH: Copy to the National Human Rights Commissioner and communicate by a Certification to the concerned party this Resolution, which contains the official position of this Secretariat of State in response to the Special Report with Recommendations of the National Human Rights Commissioner with regard to the contested acts that appear in the Affidavit rendered by Liliana Paz, Esq., and a

copy of this report should be attached. LET THIS BE COMMUNICATED.

[signature]
GUILLERMO ALVARADO DOWNING
Secretary of State, of the Offices
of Agriculture and livestock

[signature]
LILIANA PATRICIA PAZ PAGUAGA
Secretary General

Tegucigalpa, Municipality of the Central District, on the sixteenth day of the month of November, two thousand one.

[There are two partially illegible impressions of a rubber stamp with a coat-of-arms in the center reading: "{illegible} OFFICES OF AGRICULTURE AND LIVESTOCK, SECRETARY GENERAL, TEGUCIGALPA, HONDURAS, CENTRAL AMERICA".]

Boulevard Miraflors, Avenida La FAO, Tegucigalpa,
M.D.C., Honduras, Central America
Switchboard 232-8423, 232-6190; Fax 232-5375
Post Office Box 309

APPENDIX S

LA GACETA
(Gazette or Newsletter)

Official Newspaper of the Republic of Honduras

Publisher: Licenciado (*A person with the equivalent of a Masters Degree*) Juan Ramón Duran

Tegucigalpa, M.D.C. (*Central Municipal District*)
Honduras, Friday, January 13, 1995 Number 27,552

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Decree Number 157-94
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LEGISLATIVE POWER

DECREE Number 157-94

National Congress

WHEREAS: It is the duty of the State, to watch over and promote the preservation of the national agricultural patrimony by means of the enactment of judicial ordinances and other norms that contribute to this goal.

WHEREAS: The protection of the environment, of natural resources, and human health are closely related to the activities that are developing in the agricultural sector and particularly to the preventive measures, the control and eradication of plagues and diseases in plants and animals that affect national production.

WHEREAS: The modernization and reconciliation of the phyto and zoosanitary laws and norms, are indispensable requirements for the promotion of technological and informational development and are basic elements of the regional integrative process.

WHEREAS: The processes of economic reactivation and regional integration demand modernization on the State level, in its phyto and zoosanitary organization and structure, in order to attend to the demands of the aperture in International Agricultural Commerce, without diminishing plant and animal safety.

WHEREAS: The preservation of the species through the protection of fauna and flora is an indispensable condition for the maintenance of ecological equilibrium of the Honduran nation

WHEREAS: It corresponds to the Secretary of State at the Office of Natural Resources to define and execute the policies for the agricultural sector.

THEREFORE

DECREES

The following:

PHYTO ZOOSANITARY LAW

FIRST TITLE

GENERAL ORDINANCES

CHAPTER I

OF THE LAW'S OBJECTIVE

Article 1.—This Law has as its goal to watch over the protection and health of plants and animals and over the conservation of its products and byproducts, against the harmful act of plagues and diseases that bear economic, quarantine, and human importance.

Article 2.—In order to fulfill the objectives of this Law, the Secretary of Natural Resources, hereinafter SRN, will focus his efforts to strengthen the phytozoosanitation, mainly in that which refers to the diagnosis and epidemiologic vigilance, agricultural quarantine, the control of agricultural inputs, control of products that are of animal and plant origin, the programs and campaign to control and/or eradicate plagues and diseases, the accreditation of professionals and companies for phyto-zoosanitary programs, and the mechanisms for national and international reconciliation and coordination.

CHAPTER II

OF THE CREATION AND COMPETENCE OF THE NATIONAL SERVICE OF AGRICULTURAL HEALTH

Article 3.—The planning, normalization, and coordination of all activities on a national, regional, provincial and local level, relative to plant and animal health correspond to the Executive Power through the SRN. For this purpose the National Service of Agricultural Health *(Servicio Nacional de Sanidad Agropecuaria)* hereinafter SENASA, is created, as the General Management of the

SRN, which will count on two technical subsidiary offices: Plant and Animal Health.

SRN will jointly participate with other entities of the Public and Private Sector in the definition and application of the policies related to the preservation of natural resources, human and environmental health, according to the laws.

Article 4.—With the objective of strengthening the coordination, cooperation and counsel of the activities to be carried out by SENASA, national committees of health . . .

CHAPTER NINE
OF THE FINAL AND PROVISIONAL ORDINANCES
ONLY CHAPTER
OF THE FINAL AND PROVISIONAL ORDINANCES

Article 42.—The Law of Plant Health (Decree No. 23, of January 31, 1962), the Law for the Manufacturing and Commercialization of Concentrated Feed for animal use (Decree No. 91, November 24, 1969), the Law for the Industrialization of Meats (Decree Law No. 40, May 16, 1973, and the Law of Animal Health (Decree Law No. 156, November 18, 1974, are repealed.

Article 43.—The Executive Power by means of the Secretary of State in the Office of Natural Resources will issue the rules of this Law, within a time limit not greater than ninety (90) calendar days, counted from the date that this decree takes effect.

Article 44.—This Law will take effect on the date of its publication in the Diario Oficial La Gaceta.

Given in the city of Tegucigalpa, Municipality of the Central District, in the Sessions Hall of the National Congress on the fourth day of the month of November of nineteen hundred and ninety four.

CARLOS ROBERTO FLORES FACUSSE
PRESIDENT

ROBERTO MICHELETTI BAIN
Secretary

SALOMON SORTO DEL CID
Secretary

To the Executive Power

SALOMON SORTO DEL CID

Therefore: Execute

Tegũcigalpa, D.C. November 15, 1994
CARLOS ROBERTO REINA IDIAQUEZ
Constitutional President of the Republic

The Secretary of State in the Office of Natural Resources
Ramón Adolfo Villeda Bermúdez

PRESIDENCY OF THE REPUBLIC
THE ECONOMY

Resolution No. 416-94

SECRETARY OF STATE IN THE OFFICES OF TRADE AND ECONOMY. Tegucigalpa, M.D.C., December 23, 1994

VIEWED: To resolve application number 199-94 presented on November 2, 1994 by Attorney Francisco Daniel Gómez Bueso, whose qualifications are known and who resides in Tegucigalpa, Francisco Morazán as the Legal Attorney for "PLASTICOS INTERNACIONALES, INC." ('PLASINTER') company, R. T. N. AEMTSI - 1 *(no translation available for the initials, nor the acronym)* whose address is in San Pedro Sula, Cortes, located on kilometer 2 on the road to Ticamaya, South-North at 1 kilometer of Boulevard San Pedro Sula-Progreso, along the road Calpules-Choloma, and contracted to request authorization to function under the Rules for Provisional Imports in accordance to the ordinances of Decree Number 37, dated December 20, 1984 and Decree Number 190-86, October 31, 1985 and that it be granted the corresponding benefits and rights.

WHEREAS: Decree number 37, December 20, 1984 and Decree number 190-86, October 31, 1986 authorize companies and private entrepreneurs dedicated to industrial or agroindustrial activities to have recourse to the Rules for Provisional Imports, that they can establish themselves in the country with machinery, equipment, tools and other imports in order to produce articles which as a whole would be exported to non-Central American countries.

WHEREAS: The benefit of total exemption of the payment of the Income Tax granted under the Rules for Provisional Imports was repealed according to Decree number 135-94, October 12 1994.

WHEREAS: The product for export by the petitioner is taxed with an import tax as established in the Tenth Article of Decree number 873 of December 26, 1979.

WHEREAS: Based on the analysis and evaluation in the report presented by the General Management of Production and Goods the company is authorized to operate under the Rules of Provisional Imports, according to the legal ordinances that regulated the matter.

WHEREAS: That it is necessary to indicate the conditions within which the State grants benefits to industrial companies or to agroindustrial businesses to guarantee the objectives of the policy for fomenting exports.

WHEREAS: That for all that which has been previously stated, it is admissible to consent in part to that which has been requested.

THEREFORE: The Under-Secretary of the State in the Offices of Trade and Economy, applies Article 3 of Decree number 37, December 20, 1984 and Articles 1,2,4,7,8,9, **modified** and adding Article 2 of Decree Number 190-85, October 31, 1986 and Articles 3, 8, 18, 19, 25 of its Rules.

RESOLVES

1. To authorize Company "PLASTICOS INTERNACIONALES, INC. DE C.V." (PLASINTER) located in San Pedro Sula, Cortés, at kilometer 2 on the highway to Ticamaya, South-North, at Kilometer 1 of Boulevard San Pedro Sula-Progreso, along the road

Calpules-Choloma, to have recourse to the Rules of Provisional Imports, which will dedicate itself to the production of plastics and all types of packaging, purchase and sales or resins and dyes and any activity of licit trade in the Republic of Honduras, to export to non-Central American countries, under the shelter of the Rules of Provisional Imports.

2. Company "PLASTICOS INTERNACIONALES, INC., DE C.V." (PLASINTER) in order to be able to carry out the activity as described in the previous number, will enjoy the following financial benefits: suspension of payment of customs rights, consular rights, the 5% tax for administrative customs services, established by means of Decree Number 85-84, May 24, 1984 and any other taxes and additional payments, including the general sales tax generated by importing machinery, industrial equipment, primary materials, and imports that figure in Ordinance DGPC-IT/267-94, December 15, 1994, issued by the General Management of Production and Goods to benefit the aforementioned company and which may be suspended, modified or canceled by the Secretary of Trade and Commerce, by request or task of the interested party, according to that which is provided in Article 25 or Agreement number 547-87 of the sixth of May of nineteen hundred and eighty seven of the Rules of Provisional Imports.

3. Grant to the petitioner the exoneration for the payment of taxes for exports, as stated in Article Ten of Decree number 873 of December 26, 1979.

4. To deny the petitioning company the total exemption of the payment for income tax, according to that which is stipulated in Chapter VI, Article 16 of Decree number 135-94, October 12, 1994.

5. The aforementioned company must fulfill the following obligations: a) Make available to the Secretary of Treasury and Public Credit and to the Secretary of Trade and Economy a sworn statement which will detail the use that has been made of all imported goods during each semester, the same as all information relative to the value, quantity, class or the destiny for all exported goods This statement must be presented during the months of January and July of each year. b) To maintain an appropriate register that allows for the control of imported and exported goods. c) To initiate its exportable production within the six months following the date on which the beginning of operations is authorized under this instrument or of its extension if that is the case. d) To carry out its export project according to that which is stipulated in this Resolution of Authorization. e) To meet export deadlines. f) To obtain authorization from the Secretary of Economy and Trade for any modification in the initial plans that served as the basis for accepting the Rules. g) To give the appropriate authorities all facts and information they may request in order to realize oversight and control of its operations. h) Whatever else determined by appropriate authorities.

6) To deny company "PLASTICOS INTERNACIONALES, INC. DE C.V." (PASINTER), the right to import goods under the protection of the Rules of Provisional Imports as described in letter "F" of ordinance DGPC-IT/267-94, on which this Resolution was based because . . .

LA GACETA
(Gazette or Newsletter)

Official Newspaper of the Republic of Honduras

Publisher: Reporter Olman Ernesto Serrano

Tegucigalpa, M.D.C. (*Central Municipal District*)
Honduras, Wednesday, April 7,199 Number 27,016

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ANNOUNCEMENTS

PRESIDENCY OF THE REPUBLIC
NATURAL RESOURCES
Agreement no. 0008-93
Tegucigalpa, M.D. C., January 13, 1993

THE PRESIDENT OF THE REPUBLIC

WHEREAS: It is the objective of the Government of the Republic to protect the health of the population and the national economy.

WHEREAS: Fish products, by their inherent organoleptic characteristic and the ease by which their basic composition is altered, need stringent technological, hygienic, and sanitary control in their processing.

WHEREAS: Fishing is the third most important entry of the national economy.

WHEREAS: Hygienic sanitary normalization and its application by means of Official Inspection over the production and industrialization of products that are of animal origin fall under the jurisdiction of the Secretary of State in the Office of Natural Resources.

THEREFORE: By applying Decree Law Number 60, May 16, 1973 which contains the Law of Industrialization for Meat, "AGREES: to issue the following RULING FOR INDUSTRIAL AND SANITARY HYGIENE INSPECTION OF FISH PRODUCTS".

CHAPTER I
OBJECTIVES

Article 1.—This Ruling normalizes Industrial Inspection and Sanitary Hygiene for fish products throughout the national territory.

Article 2.—The appropriate authority in the execution of this Ruling is the General Management of Cattle of the Secretary of Natural Resources, through the Department of Animal Health in the Section of Official Inspection of Products that are of Animal Origin (SIOPOA).

Article 3.—Subject to Official Inspection are all fishing boats, collection centers, and plants that catch, collect, industrialize and pack fish products.

In accordance with that which is offered in this Ruling the only products that can be sold are those that have been inspected.

Only those fishing products processed in plants approved for that very purpose can be destined for export.

Article 4.—Fishing products that remain subject to this ruling are:

Fish, crustaceans, molluscs, anuran reptiles and edible mammal species of fresh or salt water, destined for internal consumption or export, and by extension, the byproducts obtained from the aforementioned products.

CHAPTER II
DEFINITIONS

Article 5.—For the purpose of this ruling the following definitions are formulated:

a—Fertilizer (manure) from fish products: The byproduct that does not meet the specifications determined by the flours (meal) of these products.

b—Oil from fish products: The liquid byproduct obtained by the treatment of primary sources through steaming, separating by decantation or centrifugation and filtration. Any treatment that results from simple pressing and decantation or by any other appropriate process is also accepted.

c—Cold sea water: The sea water whose temperature is 0° C (zero degrees centigrade) or slightly lower and that contains the same microbiological conditions that drinking water has.

d—Water from clean sea: This contains the same microbiological conditions that drinking water and has no undesirable substances.

e—Fish product stock: The liquid product obtained by boiling the product, with or without spices, canned and sterilized.

f—Collection center: This is a place or building used for the receipt, conservation and distribution of fish products.

g—contamination: The direct or indirect transmission of undesirable materials to the fish product.

h—Logbook: This is the book inscribed in the Veterinary Medical School in Honduras and authorized by the Secretary of Natural Resources in which the Veterinary Doctor is responsible for the approved establishment, consigns the . . .

APPENDIX T

Decree No. 245-2000

The National Congress,

WHEREAS the General Law of the Public Administration defines the areas of authority of the Secretariat of State in the Offices of Agriculture and Livestock, among which is included that which concerns the enforcement of the policies related to fishing, aquiculture and the protection of our hydrobiological resources;

WHEREAS the current Fishery Law, contained in Decree No. 154 dated May 19, 1959, sets forth sanctions of an administrative nature, the amounts whereof do not represent coercive measures that reflect the gravity of the violations committed, so that it is necessary to revise said sanctions according to the importance of the case and the current value of the national currency;

WHEREAS it is the duty of the State to ensure compliance with the fishery regulations in order to contribute with the sustainable yield of our hydrobiological species;

Therefore,

DECREE:

Article 1. Amend Article 70 of the Fishery Law, contained in Decree No. 154, dated May 19, 1959, which hereafter must read as follows:

"Article 70. The following violations shall be sanctioned:

a) Fishing with chemical or explosive elements, with a fine of 1,000.00 to 10,000.00 lempiras;

b) Fishing by persons without a license or with an expired license, with a fine of 50,000.00 to 500,000.00 lempiras;

c) Fishing with banned fishing gear, with a fine of 10,000.00 to 50,000.00 lempiras;

d) For marketing hydrobiological species in a closed season, with a fine of 1,000,000.00 to 2,000,000.00 lempiras;

e) For clearing mangrove swamps or destroying aquatic ecosystems in general, with a fine of 10,000.00 to 50,000.00 lempiras;

f) For polluting with any substance the maritime or continental waters, with a fine of 500.000.00 to 1,000,000.00 lempiras;

g) For capturing, destroying or extracting the protected hydrobiological species, especially the manatee *(Manatus americanus)*, with a fine of 50,000.000 to 100,000.00 lempiras;

h) Owners or captains of vessels who fail to report their catch, with a fine of 50,000.00 to 500,000.00 lempiras;

i) For conducting scientific research without a permit from the National Fishery Authority, with a fine of 50,000.00 to 100,000.00 lempiras;

j) Owners or captains of fishing vessels who fail to comply with the provisions relative to the installation of Marine Turtle Excluder Devices (DETs), according to what is

established by the National Fishery Authority, with a fine of 50,000.0 to 100,000.00 lempiras; and

k) For any other activity not expressly mentioned in the preceding items, but which is analogous, with a fine of 1,000,000.00 to 1,500,000.00 lempiras."

Article 2. Added to the aforementioned Fishery Law, the following Article:

"Article 81-A. The fines assessed by reason of the enforcement of this Law and the income received for the taxes, licenses or permits referred to therein must be paid to the General Treasury of the Republic and, through the General Budget of Income and Expenses of the Republic, must be allocated to the expense for the programs and projects carried out by the Secretariat of State in the Offices of Agriculture and Livestock through the General Fishery Directorate (DIGIPESCA)."

Article 3. The Executive Branch, through the Secretariat of State in the Offices of Agriculture and Livestock, shall issue whatever regulations as may be necessary to properly enforce the reforms introduced by this Decree in the Fishery Law.

Article 4. This Decree shall enter into effect at the time of its approval and must be published in the Official Daily *La Gaceta* ["The Gazette"].

Given in the city of Tegucigalpa, Municipality of the Central District in the Hall of Sessions of the National Congress, on the ____ day of the month of _____ of the year two thousand.

RAFAEL PINEDA PONCE
SPEAKER OF THE HOUSE

JOSÉ ALFONSO ROLANDO CÁRDENAS PAZ

HERNÁNDEZ CÓRDOVA
SECRETARY
Dse/

SECRETARY

APPENDIX U

[Coat-of-Arms]
National Congress
Secretariat
Tegucigalpa, D.C., Honduras, Central America

CONFIRMATION

The undersigned secretary of the National Congress **STATES:** That by means of Decree No. 198-2001, issued by the National Congress on November 1, 2001, **"Interpret Article 43 of the Civil Code to the effect that the total or partial express repeal of a law leaves without legal value or effects the general regulations and the specific regulations *in toto*, or in the part involving the amended article or articles when the amendment is partial, that the Executive Branch, through the respective Secretariat of State, has issued to implement the provisions of the repealed law, unless there is an express provision to the contrary in the new repealing Law,"** which, at this time, is in the process of receiving the appropriate signatures.

This Record is issued in the City of Tegucigalpa, Municipality of the Central District, on the seventh day of the month of November, two thousand one.
[illegible signature]
JOSÉ ALFONSO HERNÁNDEZ CÓRDOVA
SECRETARY OF THE NATIONAL CONGRESS
JAHC/ACCL/abr.
cc: File

APPENDIX V

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
201 Varick St. Rm. 731
NewYork, N.Y. 10014-4897

NEW YORK FROZEN SEAFOOD PRICES, WEEK ENDING FRI. November 6, 1998

Current selling prices ex-warehouse New York as reported by original receivers (importers, brokers, etc.) in the New York Metropolitan are in US DOLLARS/CENTS per pound unless otherwise stated). Fillets are skinless, unless otherwise stated.

* * * *

LOBSTER TAILS, SPINY:
AUSTRALIA: 5-6oz $20.00, 6-7 oz. $18.00 * * *
BAHAMAS: 4oz $14.30, 5oz $14.70, 6oz $14.85
BRAZIL: 2oz $10.50, 3oz $12.55, 4oz $14.45 * * *
HONDURAS: 2oz $9.75, 3oz $10.75, 4oz $13.25, 5oz. $14.35, 6oz $14.35, 7oz $14.35, 8oz $14.35, 9oz $14.15
PANAMA: 2oz $9.50, 3oz $12.50, 4oz $14.25, 5oz $17.25

* * * *

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES SERVICE
201 Varick St. Rm. 731
NewYork, N.Y. 10014-4897

NEW YORK FROZEN SEAFOOD PRICES, WEEK ENDING FRI. November 5, 1999

Current selling prices ex-warehouse New York as reported by original receivers (importers, brokers, etc.) in the New York Metropolitan are in US DOLLARS/CENTS per pound unless otherwise ,stated). Fillets are skinless, unless otherwise stated.

* * * *

LOBSTER TAILS, SPINY:
BAHAMAS: 4oz $14.80, 7oz $17.00.
BRAZIL: 2oz $11.25, 3oz $13.60, 4oz $15.50 * * *
HONDURAS: 2oz $9.50, 3oz $12.50, 4oz $14.25, 5oz. $17.25
PANAMA: 2oz $9.50, 3oz $12.50, 4oz $14.25, 5oz $17.25

* * * *

APPENDIX W

AO 245B (Rev. 9/00) Judgment in a Criminal Case: Sheet 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or after November 1, 1987)
v.	
ROBERT D. BLANDORD a/k/a ROBERT DAVID BLANDFORD	CASE NUMBER: 1:00CR00079-002
THE DEFENDANT:	Jon May and Frank Rubino Defendant's Attorney

( ) pleaded guilty to count(s) ____
( ) pleaded nolo contendere to count(s) ___ which was accepted by the court.
(X) was found guilty on count(s) 1-22, 26, 27, 28-39 & 43 second superseding indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
18 U.S.C. § 371	Conspiracy	05/10/2000	1
18 U.S.C. §§ 545 & 2	Importation contrary to law	02/04/1999	2-12

16 U.S.C. §§ 3372(a)(2)(A); 3373(d)(1)(B); 3373(d)(2) and 18 U.S.C. § 2	Importing illegal wildlife/Lacey Act	12/08/1998	13-22, 26, 27
18 U.S.C. § 1957 & 2	Fraudulent transactions of funds derived	12/11/1998	28-39
18 U.S.C. § 1957 & 1956(h)	Conspiracy to engage or attempt to engage in monetary transactions	05/10/2000	43

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

08/02/2001
Date of imposition of Judgment

/s/
RICHARD W. VOLLMER, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

8-27-01
Date

Defendant: ROBERT D. BLANDFORD a/k/a ROBERT DAVID BLANDFORD
CASE NUMBER: 1:00CR00079-002

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 97 MONTHS, consisting of 60 months as to each of counts 1-22; 12 months as to each of counts 26 and 27; and 97 months as to each counts 28-39 and 43, all such terms to run CONCURRENTLY:

* * *

APPENDIX X

AO 245B (Rev. 9/00) Judgment in a Criminal Case: Sheet 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	JUDGEMENT IN A CRIMINAL CASE (For Offenses Committed On or after November 1, 1987)
v.	
ABNER J. SCHOENWETTER a/k/a ABNER J. SCHOENWETTER	CASE NUMBER: 1:00CR00079-003
THE DEFENDANT:	Martin A. Geigenbaum and Willie Huntley Defendant's Attorney

( ) pleaded guilty to count(s) _____
( ) pleaded nolo contendere to count(s) ___ which was accepted by the court.
(X) was found guilty on count(s) 1, 7-12 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
18 U.S.C. § 371	Conspiracy	05/10/2000	1
18 U.S.C. §§ 545 & 2	Importation contrary to law	02/04/1999	2-12
18 U.S.C. § 545 & 2	Importation contrary to law	02/04/1999	7-12

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

08/02/2001
Date of imposition of Judgment

/s/
RICHARD W. VOLLMER, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

Defendant: ABNER J. SCHOENWETTER a/k/a ABNER JAY SCHOENWETTER
CASE NUMBER: 1:00CR00079-003

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 97 MONTHS, consisting of 60 months to each of counts 1, 7, 8, 9, 10 and 11 to run CONCURRENTLY and 60 months as to count 12, with 37 months to be served CONSECUTIVELY to the sentence imposed in the previous counts and the remaining 23 months to be served CONCURRENTLY to the sentence imposed in the previous counts:

* * *

APPENDIX Y

AO 245B (Rev. 9/00) Judgment in a Criminal Case: Sheet 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	JUDGEMENT IN A CRIMINAL CASE (For Offenses Committed On or after November 1, 1987)
v.	
DIANE HUANG a/k/a DIANE HUADIN HUANG	CASE NUMBER: 1:00CR00079-004
THE DEFENDANT:	Denis B. Keene and Dennis J. Krizley Defendant's Attorney

( ) pleaded guilty to count(s) _____
( ) pleaded nolo contendere to count(s) ___ which was accepted by the court.
(X) was found guilty on count(s) 1, 13-27 & 47 after a plea of not guilty. (second superseding indictment)

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
18 U.S.C. § 371	Conspiracy	05/10/2000	1
16 U.S.C. §§ 3372(a)(2)(A); 3373(d)(1)(B); 3373(d)(2) and 18 U.S.C. § 2	Importing Illegal Wildlife/Lacey Act	12/08/1998	13-27
16 U.S.C. §§ 3372(d) &	False labeling of fish or	10/06/1996	47

3373(d)(3)(A)(i) and 18 U.S.C. § 2	wildlife		

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

08/14/2001
Date of imposition of Judgment

/s/
RICHARD W. VOLLMER, JR.
UNITED STATES DISTRICT JUDGE

8-27-01
Date

Defendant: DIANE HUANG a/k/a DIANE HUADIN HUANG
CASE NUMBER: 1:00CR00079-004

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 24 MONTHS, consisting of 24 months as to each of counts 1 and 47 and 12 months as to each of counts 13-27 to run CONCURRENTLY.

* * *

(6) (4)

Nos. 03-622 and 03-627

FILED
DEC 29 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

DAVID HENSON MCNAB, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT D. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Acting Solicitor General
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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the reference in the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.*, to "any foreign law" refers only to foreign statutes and not to foreign regulations.

2. Whether the court of appeals erred in disagreeing with the representations provided by the Embassy of the Republic of Honduras, as amicus curiae in that court, respecting the application of Honduran law, which differed from the earlier representations that Honduran officials provided to United States officials and to the district court.

3. Whether the Due Process Clause requires a court of appeals to give retroactive effect to a Honduran court's asserted invalidation of a Honduran law.

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In the Supreme Court of the United States

No. 03-622

DAVID HENSON MCNAB, PETITIONER

v.

UNITED STATES OF AMERICA

No. 03-627

ROBERT D. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 331 F.3d 1228.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2003. A petition for rehearing was granted in part and denied in part on May 29, 2003 (Pet. App. 77a-

[1] Citations to the petition appendix refer to the separately bound appendix that accompanies the petition in No. 03-622.

78a). On August 8, 2003, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 26, 2003. On September 20, 2003, Justice Kennedy further extended the time within which to file a petition for a writ of certiorari to and including October 24, 2003, and the petitions were filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Alabama, petitioners were convicted of conspiracy, in violation of 18 U.S.C. 371, and other federal offenses arising from violation of the Lacey Act Amendments of 1981 (the Lacey Act), 16 U.S.C. 3371 *et seq.* Petitioners McNab, Blandford, and Schoenwetter were sentenced to 97 months of imprisonment, while petitioner Huang was sentenced to 24 months of imprisonment. Pet. App. 8a-9a. The court of appeals affirmed. *Id.* at 2a-3a.

1. The Lacey Act prohibits persons from importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce any fish or wildlife that was taken, possessed, transported, or sold in violation of any underlying foreign law. 16 U.S.C. 3372(a)(2). The Act imposes criminal penalties on violators of this provision who knew or should have known that the fish or wildlife was unlawfully taken, possessed, transported, or sold. 16 U.S.C. 3373(d)(1) (knowing violation); 16 U.S.C. 3373(d)(2) (negligent violation). In addition, Section 545 of Title 18 of the United States Code provides criminal penalties for knowingly importing or dealing in merchandise brought into the United States contrary to law.

2. Petitioner David Henson McNab owned and operated a fleet of lobster fishing boats that harvested Caribbean spiny lobster in Honduran fishing waters. During the period covered by the indictment, the Republic of Honduras imposed conservation regulations to protect its lobster fishery from over-exploitation and health regulations to ensure safe processing of fishery products. Five sets of requirements respecting the harvesting and handling of spiny lobsters are relevant to this case: (1) Resolution 030-95 prohibited harvesting, processing, or selling any spiny lobster with a tail length shorter than 5½ inches; (2) Article 70(3) of the Fishing Law prohibited harvesting or selling egg-bearing lobsters; (3) Article 30 of the Fishing Law required lobster fishermen to dock their vessels and unload their catch in a Honduran port before exportation; (4) Articles 35 and 37 of the Fishing Law required fishing vessels to report their catch in writing to Honduran authorities; and (5) Agreement 0008-93 required that any lobster be inspected and processed in Honduras before exportation. See Pet. App. 51a, 57a-64a.[2]

In violation of those requirements, McNab's fleet harvested lobsters, including egg-bearing lobsters and lobsters with tails less than 5½ inches in length, packed frozen lobsters in bulk plastic bags, and loaded them directly from the lobster boats onto McNab's cargo transport vessel, the *Caribbean Clipper*. See Pet. App. 4a-5a. Some of the lobster tails were handled in compli-

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[2] Petitioner McNab asserts that only three of those requirements are relevant to petitioners' convictions, because the government did not properly charge a violation of the landing requirements in the indictment and the evidence was insufficient for the jury to have found that the reporting requirements were violated. 03-622 Pet. 4 n.2. The court of appeals summarily rejected those arguments. Pet. App. 34a.

ance with Honduran reporting, inspection, and processing requirements, but others were transported aboard the *Caribbean Clipper* in unprocessed bulk bags to Bayou la Batre, Alabama, for delivery to Seamerica Corporation, petitioner Robert Blandford's company. *Ibid.* Once the lobster tails were in the United States, Blandford and a colleague, Abner Schoenwetter, resold the shipments to the American Export Import Corporation, through petitioner Diane Huang, and to other United States companies. See *id.* at 114a-118a (second superseding indictment). The shipments at issue in this case involved approximately 400,000 pounds of spiny lobsters, with a value of approximately $4.6 million. See *id.* at 137a-144a.

On February 3, 1999, agents of the National Marine Fisheries Service (NMFS) received an anonymous facsimile indicating that McNab's *Caribbean Clipper* would arrive in Bayou la Batre on February 5, 1999, with a shipment of lobsters containing "undersized (3 & 4 oz) lobster tails, [which was] a violation of Honduran law." Pet. App. 4a. The facsimile further stated that Honduras prohibited the bulk exportation of lobsters and required that lobsters be packed in boxes for export. *Ibid.* NMFS agents, with the assistance of the United States Department of State, thereupon consulted with the Republic of Honduras—specifically, the Honduran Direccion General de Pesca y Acuicultura (DIGEPESCA), which is the agency within Honduras's Secretaria de Agricultura y Ganaderia (SAG) that is responsible for the enforcement of Honduras fishing laws—seeking information about the legality of the lobster shipment referenced in the facsimile. *Ibid.*[3]

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[3] Throughout the investigation and resulting prosecution, federal agents and prosecutors received guidance and assistance from

The director general of DIGEPESCA responded to the agent's inquiry in three letters that described some of Honduras's laws regulating the lobster industry and confirmed that McNab's shipment had been illegally transported in violation of those laws. The director general provided authentic copies of the applicable laws and stated that the DIGEPESCA was ready to support all efforts by the government to prosecute persons who violate the Lacey Act. In early March 1999, NMFS agents seized the lobster shipment described in the anonymous facsimile based on the verifications by Honduran officials that the lobster shipment was illegal under Honduran law. Pet. App. 4a-5a.

Over the next few months, NMFS agents continued to communicate with Honduran officials about the Honduran laws and the legality of the seized lobster shipment. In June 1999, NMFS agents and an attorney in the United States National Oceanic and Atmospheric Administration (NOAA) met in Tegucigalpa, Honduras, with various Honduran officials from the SAG, including the minister, vice minister, director of legal services, director of legal affairs, secretary general, the director general of the DIGEPESCA, and the legal advisor for the Servicio Nacional de Sanidad Agropecuaria (SENASA), an agency within the SAG responsible for the enforcement of hygiene laws and regulations. Pet. App. 5a. During those meetings the Honduran officials confirmed that the lobsters had been exported illegally without first being inspected and processed, that there was a 5½ inch size limit for lobster tails, and that all catches had to be reported to

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the State Department and the United States Embassy in Honduras in determining which Honduran officials to contact in order to obtain authoritative advice about the contents of Honduran law.

Honduran authorities. The Honduran officials also provided certified copies of the laws in question. *Ibid.*

In September 1999, NMFS agents inspected the lobster shipment that had been seized earlier in the year from McNab's ship. Pet. App. 5a. The inspection confirmed that the seized lobsters were unprocessed and that a significant number had a tail length that was less than the 5½ inches required by the Honduran size limit restriction. In addition, many of the lobsters were egg-bearing or had their eggs removed. *Ibid.* In March 2000, two Honduran officials, a legal advisor in the Despacho Ministerial and a SAG legal advisor, traveled to Alabama to meet with prosecutors and investigators. Both legal advisors provided written statements reconfirming that Honduran law governing the lobster industry established size limits, prohibitions on taking egg-bearing lobsters, and processing and reporting requirements. *Id.* at 5a-6a.

Based upon NMFS's investigation and the verification of the applicable foreign laws by the Honduran officials charged with regulating the lobster fishing industry, the United States decided to prosecute petitioners for their roles in the illegal importing scheme. Pet. App. 6a. A federal grand jury ultimately returned a 47-count second superseding indictment based on the seized shipment and other shipments between 1996 and 1999. *Ibid.*; see *id.* at 114a-152a.

3. The district court conducted a pretrial hearing, in accordance with Rules 12(b) and 26.1 of the Federal Rules of Criminal Procedure, to assist in its determination of the relevant Honduran laws. Pet. App. 6a-7a; *id.* at 44a-65a. The SAG minister sent his secretary general, the SAG's highest-ranking legal official, to testify

at the hearing.[4] The secretary general testified about the validity of various laws and confirmed that the size limit, the prohibition against harvesting egg-bearing lobsters, and the processing and inspection requirement were in effect and legally binding during the time period covered by the indictment. Following the foreign law hearing, the district court ruled that the government met its burden of proving the Honduran laws that served as the predicates for the charges against petitioners. *Id.* at 6a-8a; see *id.* at 51-64a.

Following a jury trial, all four petitioners were convicted of conspiracy under 18 U.S.C. 371 for their part in the unlawful importation scheme. McNab, Blandford, and Schoenwetter were convicted of knowingly importing merchandise into the United States contrary to law in violation of 18 U.S.C. 545. Blandford was convicted of violating the Lacey Act, 16 U.S.C. 3371 *et seq.*, by: (1) dealing in fish and wildlife that he knew were unlawfully taken, possessed, transported, or sold, 16 U.S.C. 3372(a)(2)(A), 3373(d)(1)(B); and (2) dealing in fish and wildlife that he should have known were unlawfully taken, possessed, transported, or sold, 16

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[4] Petitioners characterize the secretary general as "a lower level functionary who had *no* legal authority to speak * * * on behalf of Honduras." 03-622 Pet. 17. The court of appeals determined, however, that the secretary general was the "highest-ranking legal official" in the Honduran agency responsible for regulation of the lobster fishing industry. Pet. App. 7a. The minister of that agency specifically sent the secretary general to testify at the district court's foreign law hearing on behalf of the Honduran government and later confirmed in an affidavit that she was authorized to "provide the necessary advice about and explanation of the enforcement and validity of Honduran laws." *Id.* at 8a, 22a n.25. See *id.* at 54a-55a (district court decision describing the secretary general—"[i]n contrast" to petitioners' witnesses—as "well-qualified" and "very credible").

U.S.C. 3372(a)(2)(A), 3373(d)(2). Huang was convicted of violating the Lacey Act by: (1) dealing in fish and wildlife that she should have known were unlawfully taken, possessed, transported, or sold, 16 U.S.C. 3372(a)(2)(A), 3373(d)(2); and (2) falsely labeling fish or wildlife, 16 U.S.C. 3372(d), 3373(d)(3)(A)(i). McNab and Blandford also were convicted of engaging in monetary transactions involving criminally derived property, 18 U.S.C. 1957, and of conspiring to engage in monetary transactions involving criminally derived property, 18 U.S.C. 1957, 1956(h). Pet. App. 79a-80a; 03-627 Pet. App. 169a-170a, 172a, 174a-175a. In total, McNab was found guilty on 28 counts, Blandford on 37 counts, Schoenwetter on 7 counts, and Huang on 17 counts. Pet. App. 8a.

4. After the verdicts, petitioners filed numerous motions to overturn their convictions. Among other things, the motions attacked, based on recent developments in Honduran law, the validity of the foreign laws underlying petitioners' convictions. In particular, the motions cited a May 2001 decision of a Honduran administrative law court, acting on a petition filed by McNab and opposed by the Honduran government. The administrative law court found that Resolution 030-95—which contained the 5½ inch size limit for spiny lobsters—had been promulgated through an incorrect procedure. Pet. App. 290a-301a. The Honduran judge ordered that the resolution was "entirely voided, but this is only for purposes of annulment and future inapplicability." *Id.* at 298a. The Honduran Appeals Court for Administrative Law later affirmed, through a summary order, the lower court judge's decision. *Id.* at 302a-305a.

To prepare for a hearing on petitioners' post-trial motions, an attorney from the Department of Justice and agents from NMFS and the FBI traveled to Hon-

duras in early August 2001 to discuss petitioners' challenges to the validity of the Honduran laws. See Pet. App. 8a. Three Honduran government officials, including the SAG secretary general, provided the United States with affidavits confirming the validity of the laws petitioners were challenging. *Ibid.* They also received an affidavit from the SAG minister stating that those Honduran government officials were authorized to provide advice on the enforcement and validity of the laws. *Ibid.* Following a hearing, the district court dismissed each of petitioners' post-trial motions. *Ibid.* The court sentenced McNab, Blandford, and Schoenwetter to 97 months of imprisonment and Huang to 24 months of imprisonment. *Id.* at 8a-9a.

Shortly thereafter, the Fiscal General Adjunto of Honduras, who directs the office that oversees criminal enforcement of Honduran laws, sent a letter to the United States Embassy in Honduras advising the embassy about various matters of Honduran law related to the decision of the Honduran Court of Administrative Law that Resolution 030-95 was promulgated through a technically improper procedure. See U.S. Add. to C.A. Br. (No. 01-15148-JJ) Tab 1. Among other things, the Fiscal General Adjunto stated that the Honduran court's decision on its face applied only prospectively, and that this was consistent both with Article 32 of the Law of Administrative Jurisdiction and with Article 96 of the Honduran Constitution. *Ibid.* He concluded that the court's decision "does not free [McNab] from the sanctions that would have resulted from a failure to observe the contested resolutions." *Ibid.*

5. After sentencing, petitioners appealed their convictions based, in part, on their contention that the Honduran laws used as the predicates for the Lacey Act convictions were invalid or void during the time

period covered by the indictment. With their appellate briefs, petitioners submitted several new documents, including the appellate court decision affirming the prospective invalidation of Resolution 030-95 (Pet. App. 302a-305a), an advisory report from the Honduran Human Rights Commissioner adopting certain allegations by McNab (*id.* at 306a-314a), and a statement from the minister of SAG concurring with McNab's allegations (*id.* at 315a-320a). At the same time, petitioners each filed a motion for new trial in the district court attaching the same documents. When the district court denied those motions, petitioners each filed an additional appeal. *Id.* at 9a n.12.

To assist in preparing the government's appellate brief in the first set of appeals, a Department of Justice attorney and NMFS agents again traveled to Honduras to discuss petitioners' new documents with Honduran officials. Pet. App. 9a. Once again, the Honduran officials confirmed their prior statements regarding the validity of the Honduran laws. *Ibid.* After briefing on petitioners' first set of appeals was complete and during briefing on petitioners' second set of appeals, the Embassy of Honduras and the Asociacion de Pescadores del Caribe, a Honduran trade association, filed a joint amicus curiae brief in support of McNab. *Id.* at 20a n.23 Although Honduran officials had assisted and supported the prosecution throughout the investigation and trial of this case, the Embassy and trade association's brief maintained that certain of the Honduran laws underlying petitioners' convictions were invalid at the time of the lobster shipments or had been repealed and that the United States had failed to consult with the proper Honduran officials and, instead, had intentionally sought out "midlevel employees who were not

authorized to render opinions on behalf of the Honduran government" (*id.* at 22a n.25).[5]

6. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-34a. Although petitioners raised and the court ruled on numerous issues, only two are relevant here. First, the court held that the Lacey Act's prohibition against importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce fish or wildlife taken, possessed, transported, or sold "in violation of any foreign law" includes foreign regulations and other legally binding requirements that have the force of law, and not just foreign statutes. *Id.* at 10a-18a. Second, the

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[5] Notwithstanding the Embassy's representations, the Honduran government apparently does not act in accordance with the Honduran administrative court's conclusion that Resolution 030-95 was issued through an incorrect procedure. The Honduran court cited two reasons for its conclusion: (1) that Resolution 030-95 was issued as a "Resolucion" rather than an "Acuerdo," the former being a form of law that is to be used only for resolving individual disputes and not to set forth general rules of conduct such as the size limit; and (2) Resolution 030-95 was not signed by the President. Pet. App. 290a-292a. But Honduras apparently continues to make widespread use of resolutions not signed by the President "to set requirements of general applicability" in regulating industry, and Honduras takes enforcement actions for violations of those requirements. U.S. Add. to C.A. Br. (No. 01-15148-JJ) Tab 2 (statement of Fiscal General Adjunto). For example, the Honduran Embassy recently submitted, as recently as August 2003, various resolutions, none of which were signed by the President, to the United States Department of State as evidence supporting its contention that Honduras should be certified pursuant to United States law as adequately regulating its shrimp fishery to prevent incidental taking of sea turtles. See Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, § 609(b), 103 Stat. 1038.

court rejected petitioners' contentions that three of the five Honduran laws underlying their convictions were invalid during the period covered by the indictment. *Id.* at 18a-34a.

The court of appeals devoted the majority of its discussion to the validity of the Honduran laws. The court specifically examined the views expressed by the Honduran Embassy and a Honduran trade association, on the one hand, and the positions taken by Honduran officials throughout the investigation and prosecution of petitioners, on the other. The court of appeals stated that the unusual circumstances of the case required it to determine "whether we are bound by the Honduran government's current position regarding the validity of these laws, or whether we are free to follow the Honduran government's original position." Pet. App. 20a.

The court stated that, in determining questions of foreign law, "[a]mong the most logical sources for the court to look to in its determination of foreign law are the foreign officials charged with enforcing the laws of their country." Pet. App. 21a. Under normal circumstances, "[t]he court reasonably may assume that statements from foreign officials are a reliable and accurate source and may use such statements as a basis for its determination of the validity of foreign laws." *Id.* at 21a-22a. The court of appeals observed, however, that the circumstances of this case presented an unusual situation because Honduran officials had supported the validity of its laws and assisted the United States government throughout the investigation and prosecution, but then, after petitioners had been sentenced and the case was on appeal, Honduran officials had attempted to refute the original position of their country's representatives. *Id.* at 3a, 22a-23a. Accordingly, the court found, it was required to decide "a matter of first

impression": "whether our courts are bound by a foreign government's new representations regarding the validity of its laws when its new representations are issued only postconviction and directly contravene its original position upon which the government and our courts relied and the jury acted." *Id.* at 3a.

The court of appeals concluded that, where "a foreign government changes its original position regarding the validity of its laws after a defendant has been convicted, our courts are not required to revise their prior determinations of foreign law solely upon the basis of the foreign government's new position." Pet. App. 22a-23a. The court conducted its own analysis of the three Honduran laws that petitioners challenged, and it determined that those laws were valid during the period covered by the indictment. *Id.* at 24a-33a. The court also rejected the Honduran Embassy's and trade association's assertion in their amicus brief that the United States had not followed the proper channels in contacting Honduran officials about the validity of the Honduran laws at issue in the case. *Id.* at 22a n.25. The court found that "the record indicates quite the contrary" and that "it is clear that the government conducted its investigation properly through the Honduran officials who were responsible for interpreting, enforcing, and applying the fishing laws of Honduras." *Ibid.*[6]

ARGUMENT

Petitioners contend that the Lacey Act applies only to foreign laws, not foreign regulations, that the court of appeals failed to accord deference to a foreign sover-

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[6] Expressing "some hesitation," Judge Fay dissented "from that portion of the majority opinion upholding the validity of Honduran Resolution 030-95," which was one of the three Honduran laws at issue. Pet. App. 35a.

eign's interpretation of its own laws, and that the enforcement of Honduran law through the Lacey Act in this case violates due process. 03-622 Pet. 14-30; 03-627 Pet. 10-30. Those contentions lack merit. The court of appeals correctly concluded that the Lacey Act's reference to "any foreign law" includes both a foreign nation's statutes and its regulations. In evaluating the Honduran laws at issue here, the court gave due consideration to the Government of Honduras's position, as expressed by the Honduran Embassy, but the court ultimately and appropriately determined the substance of foreign law based on all the information before it. And there is no merit to petitioners' argument, which they raised for the first time on petition for rehearing, that the court's application of Honduran law would violate the Due Process Clause. Contrary to petitioners' contentions, the court of appeals' resolution of those issues does not conflict with any decision of this Court or another court of appeals, nor do those issues present any question otherwise warranting this Court's review.

1. Petitioners Blandford, Schoenwetter, and Huang argue (03-627 Pet. 28-30) that the Lacey Act's reference to "any foreign law" refers only to foreign statutes and does not include a foreign nation's administrative regulations and other legally binding provisions. The court of appeals, like every other court that has encountered the issue, correctly rejected that argument. See Pet. App. 10a-18a.

As this Court has recognized, the term "law" is commonly understood to include administrative regulations. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979) (holding that "authorized by law" in 18 U.S.C. 1905 includes administrative regulations); see also *United States* v. *Mitchell*, 39 F.3d 465, 468 (4th Cir.

1994) (holding that "contrary to law" in 18 U.S.C. 545 includes administrative regulations), cert. denied, 515 U.S. 1142 (1995). Consistent with that understanding, the lower courts have consistently interpreted the term "any foreign law" in the Lacey Act to include all forms of foreign law and not simply statutes. The Ninth Circuit has twice so held, rejecting precisely the arguments advanced here by petitioners. See *United States* v. *Lee*, 937 F.2d 1388, 1392 (1991) (holding that a violation of a foreign regulation constitutes a violation of "any foreign law" within meaning of the Lacey Act), cert. denied, 502 U.S. 1076 (1992); *United States* v. *594,464 Pounds of Salmon*, 871 F.2d 824, 830 (1989) (same). Other courts, without explicitly discussing the issue, routinely have applied the Lacey Act to violations of foreign laws that were not statutes.[7]

Petitioners suggest that the lower courts' uniform interpretation of the Lacey Act conflicts with this Court's decision in *United States* v. *Eaton*, 144 U.S. 677 (1892). *Eaton* involved a statute regulating manufacturers and dealers in oleomargarine that provided criminal penalties for knowing or willful failures "to do, or cause to be done, any of the things required by law." *Id.* at 684-685. The Court held that violation of an Internal Revenue Service regulation imposing record-

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[7] See, *e.g.*, *United States* v. *One Afghan Urial Ovis Orientalis Blandfordi Fully Mounted Sheep*, 964 F.2d 474, 477 (5th Cir. 1992) (importation into the United States of sheep exported from Pakistan in violation of Pakistani Export Trade Order); *United States* v. *Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 388-389 & n.6 (S.D. Fla. 1993) (lobsters taken in violation of Turks and Caicos Fisheries Protection Regulations); *United States* v. *2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1113 (S.D. Fla. 1988) (birds exported from Peru in violation of Peruvian Supreme Decree).

keeping requirements on margarine wholesalers did not trigger criminal penalties under that statutory provision. *Id.* at 687-688. This Court has repeatedly cautioned, however, that *Eaton* "turned on its special facts" and "has not been construed to state a fixed principle that a regulation can never be a 'law.'" *United States* v. *Howard*, 352 U.S. 212, 216 (1957); *Singer* v. *United States*, 323 U.S. 338, 345 (1945). Hence, there is no conflict between *Eaton* and the court of appeals' decision in this case.[8]

2. Petitioners argue (03-622 Pet. 15-28; 03-627 Pet. 10-20) that the court of appeals failed to give appropriate deference to the Honduran Embassy's representations respecting the application of Honduran law. Petitioners mischaracterize the court of appeals' decision, which accorded due consideration to the position expressed by the Honduran Embassy, but, on examination of the totality of circumstances, concluded that the embassy's position was not persuasive.

a. Rule 26.1 of the Federal Rules of Criminal Procedure provides that a federal court shall determine issues of foreign law as "questions of law" and authorizes the court to "consider any relevant material or source." Accord Fed. R. Civ. P. 44.1. Rules 26.1 and 44.1 make clear that the court has ultimate authority for resolving issues of foreign law, but it may consider the representations of foreign nations respecting application of their laws. The federal courts have developed the practice of granting substantial—but measured—

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[8] Indeed, *Howard* involved the Federal Black Bass Act, a predecessor of the Lacey Act that in relevant part prohibited transportation of fish across state lines contrary to "the law of the State" from which the fish was transported. 352 U.S. at 215-219. The Court held that "law of the State" included administrative rules and regulations. *Ibid.*

deference to a foreign nation's representations respecting its own laws. As the Second Circuit recently stated, "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas Co.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2002), cert. denied, 123 S. Ct. 2256 (2003).[9]

The court of appeals followed that approach in this case. It noted that statements from foreign officials are "logical sources for the court to look at in its determination of foreign law" and that courts "reasonably may assume that statements from foreign officials are a reliable and accurate source" in determining issues of foreign law. Pet. App. 21a-22a. But consistent with *Karaha Bodas*, the court refused to accept uncritically the Honduran Embassy's new representations, which differed dramatically from past Honduran representations. See *id.* at 22a-24a.

The court's decision is not only consistent with the approach articulated in *Karaha Bodas* and other cases, but it is also consistent with deference principles generally. As this Court has explained in the context of federal administrative law, "[t]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998)

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[9] Accord *Access Telecom, Inc.* v. *MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (stating that "courts may defer to foreign government interpretations," but declining to do so under the circumstances of that case), cert. denied, 531 U.S. 917 (2000); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) ("A court of the United States owes substantial deference to the construction France places on its domestic law.").

and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). But that deference is not unbounded:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all the factors which give it power to persuade, if lacking power to control.

Id. at 228 (quoting *Skidmore*, 323 U.S. at 140). As petitioners concede, analogous principles apply here. 03-622 Pet. 23.[10]

Under those traditional deference principles, the court of appeals' refusal to accept uncritically the Honduran Embassy's new representations respecting Honduran law was appropriate. Those representations —which departed from past Honduran representations made directly both to United States officials through

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[10] Petitioners mistakenly cite *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as an example of deference principles. *Chevron* deals with the specific situation in which deference is appropriate because Congress has explicitly or implicitly delegated responsibility to a federal agency to make rules carrying the force of law. See *Mead*, 533 U.S. at 226-227. That case does not provide the appropriate analogy here because the Federal Rules of Criminal Procedure charge the federal courts with the responsibility to determine, de novo, the content of foreign law. See *Riggs Nat'l Corp.* v. *Commissioner*, 163 F.3d 1363, 1368 (D.C. Cir. 1999) (federal rules of procedure "direct[] U.S. courts to conduct a *de novo* review of foreign law"). *Skidmore* instead provides the appropriate analogy. Compare *Skidmore*, 323 U.S. at 140 (an agency's explanation has "power to persuade, if lacking power to control"), with *Karaha Bodas*, 313 F.3d at 92 ("a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference"); see also *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (interpretations in agency opinion letters receive *Skidmore* deference).

inter-governmental consultations concerning this specific prosecution and to a federal district court—did not reflect a consistently held view of Honduran law. See Pet. App. 5a-9a, 24a-33a; pp. 4-7, 8-10, *supra*. The court of appeals specifically determined that the Honduran Embassy's primary explanation for the change in position—that the previous position merely reflected the opinions of unauthorized low-level functionaries that had been solicited in a deliberate attempt to bypass official channels—was untrue. Pet. App. 22a n.25. Furthermore, the new representations lacked the "power to persuade" because they conflicted with the text of the laws, other pertinent Honduran legal authority, and the evidence of petitioner McNab's own expressed understanding of those laws. See *id.* at 24a-28a (Resolution 030-95), 29a-31a (Regulation 0008-93), 32a-33a (Article 70(3)).[11]

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[11] Judge Fay dissented only from the majority's analysis of Resolution 030-95, which imposed the size limit on lobsters. Pet. App. 35a. In his view, the Honduran government had not "changed its position" on the validity of that resolution and the Honduran court's asserted invalidation was controlling. See *ibid.* Judge Fay, however, was mistaken in his understanding of the record. During the district court's pretrial proceedings to determine foreign law, Honduran officials testified that the resolution was valid at the time of the offense. See *id.* at 24a n.26. McNab (who had recognized the validity of the resolution at the time of his unlawful takings, *ibid.*) later successfully sought to invalidate the resolution on procedural grounds. The Honduran court, however, invalidated the regulation "*only for purposes of [its] annulment and future inapplicability.*" *Id.* at 25a. Following that action, Honduran officials repeatedly confirmed that the invalidation, by its terms, would not have retroactive effect. See *id.* at 26a n.28, 27a n.29. That conclusion is consistent with other provisions of Honduran law. *Id.* at 27a n.30.

The court of appeals' decision rests on a proper understanding and articulation of deference principles. At bottom, petitioners simply challenge the court's application of those correctly stated principles to a situation —the determination of the scope of three particular Honduran fishing regulations—that is unlikely ever to recur. That issue does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

b. There is no merit to petitioners' claim that the court of appeals' decision conflicts with decisions of other courts of appeals. Petitioners rely on cases involving markedly different factual situations, and the differences in outcome are correspondingly unremarkable. As this Court has explained in the domestic law context, and the lower courts have consistently recognized in the foreign law context, the application of deference principles depends on a variety of factors and therefore inevitably leads to results that vary with the circumstances. See, *e.g.*, *Mead*, 533 U.S. at 228; *Karaha Bodas*, 313 F.3d at 92.[12]

Petitioners cite, for example, *Riggs National Corp.* v. *Commissioner*, 163 F.3d 1363 (D.C. Cir. 1999), as an example of a court's deference to a foreign govern-

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[12] Petitioners also argue (03-622 Pet. 15) that the court of appeals' decision is inconsistent with dicta from this Court's 1825 decision in *Emmendorf* v. *Talyor*, 23 U.S. (10 Wheat.) 152, 159-160 (1825), suggesting deference to the decisions of foreign courts respecting foreign law. This case, however, involves the question of deference to the views expressed below by the Honduran Embassy on behalf of the Republic of Honduras interpreting its laws and judicial decisions, and the *Emmendorf* dicta accordingly does not address the issue presented here.

ment's interpretation of foreign law. See 03-622 Pet. 15-17. That decision, however, which involved the act of state doctrine, is clearly distinguishable The issue before the court was whether Brazil had properly applied its tax laws to the Central Bank of Brazil. The court was "hesitant to treat an interpretation of law as an act of state, for such a view might be in tension with rules of procedure directing U.S. courts to conduct a *de novo* review of foreign law when an issue of foreign law is raised." *Riggs Nat'l Corp.*, 163 F.3d at 1368. The court concluded, however, that Brazil's "order to the Central Bank to pay the taxes," which required the Central Bank to undertake government-compelled action in Brazil, "goes beyond a mere interpretation of law" and is therefore subject to the act of state doctrine. *Ibid.* In this instance, the court of appeals has no occasion to call into question any "act of state." See Pet. App. 23a ("Honduras has every right to invalidate and repeal the laws at issue in this case."). Rather, the court examined solely the Honduran government's inconsistent characterizations of its laws and judicial decisions. *Id.* at 24a-33a.

Petitioners also rely (03-622 Pet. 17-18) on *Richmark Corp.* v. *Timber Falling Consultants*, 959 F.2d 1468 (9th Cir.), cert. dismissed, 506 U.S. 948 (1992), which held that a Chinese corporation was required to comply with the district court's discovery orders, even if doing so would violate Chinese secrecy laws. *Id.* at 1474-1479. In so holding, the court "accepted" the Chinese Government's position that the discovery orders would require the Chinese corporation to violate Chinese law. *Id.* at 1474. The court stated that such acceptance was required because it had "neither the power nor the expertise to determine for ourselves what [Chinese] law is." *Id.* at 1474 n.7. The court was plainly mistaken in

suggesting that federal courts lacked the "power" to determine the content of Chinese law. See Fed. R. Crim. P. 26.1; Fed. R. Civ. P. 44.1. Nevertheless, as the court of appeals in this case expressly recognized (Pet. App. 21a), the court was entitled to rely on the foreign government's representations in the absence of countervailing considerations. In any event, the court's discussion of the issue of Chinese law also was dicta. The resolution of that issue was unnecessary to its decision because the court found that the Chinese company had to comply with the district court's discovery order regardless of whether Chinese law prohibited such compliance. 959 F.2d at 1474-1479.

Petitioners next rely (03-622 Pet. 19-22) on *Karaha Bodas, Access Telecom, Inc.* v. *MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), cert. denied, 531 U.S. 917 (2000); and *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992), which all simply stand for the proposition that "a foreign sovereign's views regarding its own laws merit—although they do not command—some degree of deference." *Karaha Bodas*, 313 F.3d at 92 (citing *Amoco Cadiz*, 954 F.2d at 1312, and *Access Telecom*, 197 F.3d at 714). Each of those cases involves the application of the same deference principles that the court of appeals applied here to different factual situations.

In *Karaha Bodas*, the Second Circuit concluded, after conducting its own analysis of an issue of Indonesian law, that the Indonesian government's representations provided additional support for the court's conclusion. 313 F.3d at 90-92. In *Access Telecom*, the Fifth Circuit noted that "courts may defer to foreign government interpretations [of their laws]," but did not follow an interpretation of Mexican law stated in an Official Circular of the Mexican Secretary of Communications

and Transportation because, among other reasons, it was not clear that the Secretary was authorized to interpret Mexican law and the most relevant Official Circular addressed a more recent enactment than the one at issue in that case. 197 F.3d at 714. In *Amoco Cadiz*, the Seventh Circuit gave "substantial deference" to the French Government's interpretation of its laws, where France's interpretation reflected its long-standing consistent position on the issue presented. 954 F.3d at 1312. In none of those cases did the court of appeals encounter the specific situation present here, where the foreign representatives' statements were inconsistent with the text of the relevant legal authorities and other official representations made to United States officials and a lower court. See Pet. App. 24a-33a.[13]

Indeed, petitioners cite (03-627 Pet. 14) only one decision that remotely resembles the situation presented in this case, *Jota* v. *Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998), and that decision supports the outcome here. In

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[13] The other decisions that petitioners cite are likewise distinguishable. In *Kaho* v. *Ilchert*, 765 F.2d 877 (9th Cir. 1985), the Crown Solicitor of Tongo initially wrote a letter to the U.S. Library of Congress expressing his view on an issue of Tongan law, and then six months later sent a letter clarifying his view. *Id.* at 883. Both letters predated not only the case, but also the filing of the immigration petition that gave rise to the litigation. The court of appeals did not simply defer to the Tongan Government's position but instead resolved the issue of Tongan law based on its own detailed analysis of the materials in the record. *Id.* at 884-885. In *United States* v. *Pillsbury Flour Mills Co.*, 96 F.2d 854 (C.C.P.A. 1938), the Court of Customs and Patent Appeals held that it should defer to the Cuban Government's interpretation of a Cuban tax law, where it was uncontested that the interpretation had consistently been followed in Cuba and never challenged in Cuban courts. *Id.* at 858-859.

that instance, the Second Circuit declined to defer to the Republic of Ecuador's changed view of its own law while a matter was on appeal. The court of appeals stated that it was permissible to "hold[] a nation to the litigating position it asserted prior to the entry of judgment." *Id.* at 160. Although the court also noted the countervailing "desirability of having the courts of one nation accord deference to the official position of a foreign state," it recognized that "consideration of a nation's altered litigating stance cannot justify an altered outcome that would unduly prejudice a party that had acted in reliance on a judgment entered in light of the nation's original position or would result in a significant waste of judicial resources by renewing litigation fully tried." *Ibid.*[14]

Petitioners are also mistaken in contending (03-622 Pet. 27-28) that the issue presented here—whether a federal court may disagree with a foreign embassy's representations respecting foreign laws, when those representations differ from the text of the relevant legal authorities and from authoritative representations provided earlier by foreign officials to the United States and to a lower court—will occur with any frequency. The court of appeals in this case described the matter as one of "first impression in this Circuit and apparently the other circuits as well," Pet. App. 3a, while the court of appeals in *Jota* described the situation as one that is "rarely encountered," 157 F.3d at 160. While foreign law may regularly be implicated in

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[14] The court ultimately determined that, because the district court had erred in its rulings, "[t]his case does not require us to determine whether, or in what circumstances, we might remand a case, pending on direct review, solely because of a sovereign nation's altered litigating position." 157 F.3d at 161.

domestic litigation, the degree of deference will inevitably vary with the circumstances. This Court's review is unlikely to provide significant guidance beyond the Court's prior observation in the domestic law context that courts must "tailor deference to variety." *Mead*, 533 U.S. at 236.

3. Petitioners mistakenly contend (03-622 Pet. 28-30; 03-627 Pet. 20-21)) that their convictions are invalid because they are entitled to the benefit of any favorable changes in Honduran law. To the extent that petitioners rely on the Honduran Embassy's new representations concerning Honduran law, however, those materials constitute interpretations of Honduran law. They do not constitute a change in the laws themselves.[15]

Some actual changes in Honduran law—as opposed to mere changes in opinion about Honduran law—did occur during the course of the proceedings below. In December 1999, Honduras repealed Regulation 0008-93, which contained the inspection and processing requirements, and replaced it with updated but substantially similar inspection and processing requirements. Pet. App. 29a. In 2001, a Honduran court declared Resolu-

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[15] The question whether petitioners could have been convicted of a criminal offense in Honduras is, of course, irrelevant to the validity of their convictions in the United States, because the Lacey Act's criminal enforcement provisions apply regardless of whether a defendant could face criminal enforcement action for the underlying violation of a law regarding fish or wildlife. See *United States* v. *Lee*, 937 F.2d 1388 (9th Cir. 1991) (affirming Lacey Act conviction for violations of Taiwanese administrative regulation that carry no criminal sanction in Taiwan); *United States* v. *Cameron*, 888 F.2d 1279, 1282 (9th Cir. 1989) (affirming Lacey Act conviction for violations of federal Halibut Act that would not be a criminal violation under the Halibut Act).

tion 030-95, the size limit regulation, prospectively invalid. *Id.* at 25a. Also in 2001, the Honduran Congress amended Article 70(3) of the Fishing Law, which contains the prohibition against harvesting or destroying lobster eggs. *Id.* at 33a. As the court of appeals explained, however, the inquiry mandated by the Lacey Act is the legality of the conduct under Honduran law at the time it occurred, rather than whether such conduct is now legal:

> If the laws were valid in Honduras during the time period covered by the indictment, the defendants violated the Lacey Act by importing the lobsters in violation of those laws. Whatever changes in the laws occurred after the lobsters were imported into the United States illegally have no effect on the defendants' convictions.

Id. at 19a-20a; see *id.* at 27a-28a ("The fact that Honduras now may not hold the defendants liable for past shipments that contained undersized lobsters does not change the fact that those shipments violated then-valid Honduran laws and the Lacey Act."). Because, as the court of appeals found, none of these changes in Honduran law had retroactive effect under Honduran law, they did not retroactively legalize petitioners' lobster shipments.[16]

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[16] The court of appeals specifically examined Article 96 of the Honduran Constitution, which provides that changes in the law do not have a retroactive effect, the only exception being that a "new law" applies retroactively in penal matters. Pet. App. 28a n.30, 415a. The court of appeals reasoned that the Honduran court's declaration of the prospective invalidity of Resolution 030-95 was not a "new law" and that the exception for penal matters therefore did not apply. *Id.* at 27a n.30. The exception for "new law" in penal matters also would not apply because no Honduran "penal

Petitioners mistakenly suggest (03-622 Pet. 29; 03-627 Pet. 21) that United States law mandates that changes in Honduran law must operate retroactively to petitioners' benefit. The questions whether the lobster shipments violated Honduran law and whether subsequent developments in Honduran law retroactively legalized the shipments are questions of Honduran law. The Due Process Clause of the Fifth Amendment to the United States Constitution does not require that Honduras apply its invalidation of Honduran law retroactively. Cf. *Bunkley* v. *Florida*, 123 S. Ct. 2020 (2003) (per curiam) (accepting the Florida Supreme Court's characterization of its state law determination for purposes of due process analysis); *Fiore* v. *White*, 531 U.S. 225, 228-229 (2001) (per curiam) (accepting Pennsylvania's characterization of its state law determinations for purposes of due process analysis).

The court of appeals correctly focused, therefore, on whether, under Honduran law, the relevant requirements were in effect during the period covered by the indictment. The court of appeals' determination that Honduras did not retroactively invalidate the regulations at issue presents a case-specific, non-recurring question that does not merit this Court's review.

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matters" or criminal proceedings were involved in this case, which was a prosecution in a United States court for federal criminal offenses. See *ibid.*

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
FILED
JAN 13 2004
OFFICE OF THE CLERK

(3)

No. 03-627

IN THE

Supreme Court of the United States

ROBERT D. BLANDFORD, ABNER SCHOENWETTER, AND DIANE H. HUANG,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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JANUARY 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONERS

Petitioners Robert D. Blandford, Abner Schoenwetter, and Diane H. Huang hereby reply to the Brief for the United States in Opposition.

1. In its Opposition, the United States does not dispute petitioners' argument (Pet. 21) that whether "foreign law" in the Lacey Act encompasses regulations is an important question of federal law. Opp. 14-16.[1] The United States summarily states that the lower court "correctly rejected" petitioners' arguments that the phrase

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[1] Neither does the United States dispute petitioners' assertion that they and others similarly situated "have been, or are being, unfairly targeted for minor foreign regulatory infractions under the Lacey Act" and that this issue is likely to recur. Pet. 23. Here, petitioners Blandford and Schoenwetter and co-petitioner David Henson McNab (03-622 Pet.) each received draconian 97-month prison sentences for "smuggling" lobster tails from Honduras in clear plastic bags that were routinely inspected by U.S. Customs and FDA officials rather than in opaque cardboard boxes. As the Brief of Amici National Association of Criminal Defense Lawyers (NACDL), *et al.*, alarmingly notes (NACDL Br. at 9-10), even a misdemeanor (with a "should have known" standard of intent) Lacey Act violation of obscure foreign wildlife or fishing regulations can be unfairly bootstrapped, as it was here, into felony smuggling and money laundering charges resulting in substantial prison sentences. While the average prison sentence in the Eleventh Circuit for Environmental and Wildlife offenses is 9.6 months, *id.* at 10, the sentences imposed here for first offenders were up to 10 *times* that level, and greater than prison sentences imposed on many drug dealers and offenders guilty of serious *malum in se* crimes rather than regulatory Lacey Act infractions, where administrative and civil remedies are available and more appropriate. Pet. 6, n.4. Furthermore, according to the most recent report available, of all the various federal environmental statutes on the books, the Lacey Act is the one statute that is regularly invoked the most often for criminal investigation. *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Federal Enforcement of Environmental Laws, 1997* at 3 (Table 3) (Nov. 1999).

"foreign law" excludes regulations. Opp. 14. In doing so, the United States does not address any of petitioners' arguments that the decision ignored or violated basic canons of statutory construction that this Court has established. Pet. 23-29. The United States does not even *attempt* to defend the reasoning of the court of appeals or the pair of Ninth Circuit decisions upon which the lower court relied. Instead, the United States is content simply to claim there is no direct conflict among the circuits or this Court on the specific issue presented and that the outcome is consistent with the outcome of three non-Lacey Act cases.

a. The United States (Opp. 15) cites two Ninth Circuit cases interpreting the Lacey Act upon which the panel below relied, *United States v. Lee*, 937 F.2d 1388 (1991), and *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (1989), without addressing any of petitioners' arguments (Pet. 21-28) as to why those decisions interpreting the phrase "any foreign law" to include regulations were erroneous.[2] As argued in more detail in the Petition, if foreign law includes regulations, then the word "regulation" in the Lacey Act used in conjunction with the phrase "State law" is redundant. A construction that makes a word redundant is to be avoided wherever possible. And even if the legislative history were relevant, before 1981, the Lacey Act regulated trading in wildlife "in violation of any law or regulation of any State or foreign country" (formerly 18 U.S.C. § 43(a)(2)). In 1981, however, Congress repealed the Lacey Act *in its entirety*, failed to adopt a proposal to include a definition of "foreign law" to mean "laws or regulations of a foreign country,"

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[2] The United States also cites a few other lower court Lacey Act cases but concedes the issue was not even expressly presented in those cases. Opp. 15, n.7.

and instead enacted the current law which omits the term "regulation" with respect to foreign law, but kept the term when describing the coverage of the Act for violation of "any law . . . or *regulation of the United States*," 16 U.S.C. § 3372(a)(1) (emphasis added) and "violation of any law *or regulation of any State*. . . ." 16 U.S.C. § 3372(a)(2) (emphasis added). Applying basic rules of statutory interpretation, foreign "regulations" are not covered by the Lacey Act.

b. The United States also cites three non-Lacey Act cases, *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979), *United States v. Mitchell*, 39 F.3d 465, 468 (4th Cir. 1994), and *United States v. Howard*, 352 U.S. 212, 216 (1957). Opp. 14-16 & n.8. But in those three cases, contrary to the Lacey Act, the statutes at issue did *not* use the words "law" and "regulation" in a manner that would render the term "regulation" superfluous if it were included in the definition of "law." *See Chrysler*, 441 U.S. at 294 (unlawful to disclose information "not authorized by law"); *Mitchell*, 39 F.3d at 467-68 (unlawful to import merchandise "contrary to law"); *Howard*, 352 U.S. at 213 (unlawful to transport fish across state lines "contrary to the law of the state * * * from which such * * * fish * * * is to be transported"). Thus, none of these three cases addressed the question presented here, and none exempts the Lacey Act from the traditional rules of statutory construction.

Chrysler is distinguishable for an additional reason: the issue there was whether the statute should be read broadly to *preclude* criminal liability, not to *impose* it as here. The statute made it a crime to disclose information that was "not authorized by law." The Court held that disclosure pursuant to a federal regulation was authorized

by law, and hence there was no criminal liability. Here, in contrast, the United States seeks a broad reading of "law" to include "regulations" to *establish* criminal liability. It is in this relevant context that this Court, as well as lower federal courts, have been reluctant to read "law" to include "regulations." *See, e.g., United States v. Eaton*, 144 U.S. 677, 688 (1892); *United States v. Gordon*, 464 F.2d 357, 357-58 (9th Cir. 1972) (per curiam). The United States distinguishes *Eaton* on its facts and asserts that the case did not state a fixed principle that a regulation can never be a law (Opp. at 16), but does not explain what about *Eaton*'s facts is distinguishable, what principle *Eaton* does allegedly stand for, and why that alleged principle does not apply here. Further, the United States does not even address *Gordon*, neither does it deny that there is a conflict on this issue between *Gordon* and the divided panel in *Mitchell*.

Further, petitioners acknowledged (Pet. 29 n.9) that this Court in *Howard* held that the then-current version of the Black Bass Act (a predecessor to the Lacey Act) encompassed certain Florida regulations. Petitioners explained, however, that *Howard* is distinguishable because a Florida statute had expressly made it a criminal offense to violate the regulations at issue. *See Howard*, 352 U.S. at 213 ("The relevant fishing provisions consisted of the rules and regulations of the Florida Game and Fresh Water Fish Commission *and a criminal penalty imposed by the legislature for violation of the rules*") (emphasis added). Numerous cases support this ground for distinguishing *Howard*. *See Gordon*, 464 F.2d at 357-58 (distinguishing *Howard* on the ground that "a violation of the applicable regulation of the Florida Game Commission was punishable as a crime," whereas "a violation of the applicable Nevada Gaming Commission regulation can lead only to civil sanctions"); *see also United States v. Goldfarb*, 643 F.2d

422, 428-29 (6th Cir. 1981) (court notes, and government concedes, that a violation of Nevada Gaming Commission Regulations could not in and of itself form the predicate state law violation required for a federal prosecution under the Travel Act); *United States v. DeLuna*, 763 F.2d 897, 906-07 (8th Cir. 1985) (following *Goldfarb* on this point). Inexplicably, the United States is content (Opp. at 16 n.8) simply to restate the holding in *Howard*, without addressing petitioners' argument that it is distinguishable under this established precedent.

c. Finally, the United States did not address petitioners' argument (Pet. 29-30) that the Lacey Act is at least ambiguous on this issue so that the Rule of Lenity applies in this criminal case. The United States does not refute petitioners' claim that this Court should grant *certiorari* to determine whether the Rule of Lenity, "rooted in fundamental principles of due process," applies here, either with respect to this question, or with respect to the meaning of Honduran law. *See Dunn v. United States*, 442 U.S. 100, 112 (1979).

2. The United States concedes that "federal courts have developed the practice of granting *substantial . . . deference* to a foreign nation's representations respecting its own laws." Opp. 17-18 (emphasis added). Yet the panel majority, in sharp conflict with its sister circuits, did not apply *any* deference, let alone *substantial deference*, to the authoritative and official views of the Republic of Honduras respecting the interpretation and validity of its own laws. To the contrary, the panel majority expressed hostility to those authoritative views, opting instead to rely upon (subsequently recanted) testimony at the foreign law hearing of a single midlevel agency official who had no authority to interpret Honduran law, let alone provide a United States

court with the official views of the Honduran government respecting those laws.[3]

Review is thus warranted to resolve this clear conflict among the Eleventh Circuit and the other circuits over the appropriate degree of deference afforded foreign countries' authoritative views of their own laws, particularly where litigation in federal courts over the meaning of foreign laws in resolving disputes continues to grow in frequency and importance.

a. The United States argues (Opp. 20) that this Court should not grant *certiorari* because the panel majority simply applied an undisputed standard of deference to

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[3] The United States incorrectly suggests that at the pretrial foreign law hearing, "Honduran officials testified that the resolution [030-95] was valid at the time of the offense." Opp. 11. There was only *one* official who testified live, Lillian Paz, Secretary General of the Ministry of Agriculture and Livestock, who, according to the Honduran government, had "*no* authority" to testify on the country's behalf. Br. for Honduras at 15. Paz's duties as Secretary General did *not* include interpreting or enforcing Honduran laws. Her main job duties were essentially to keep official records of the agency and to perform related ministerial tasks. When asked what her duties were, Paz testified, "What I do is attest to the authenticity of the signatures of the Ministers" and certify that copies of agency documents conform to the originals. 03-622 Pet. App. 160a. Thus, her duties were more akin to those performed by a notary rather than those of a General Counsel or Legal Advisor of an agency possessing expertise in the laws and regulations that the agency administers. As a young attorney, she did not even occupy the post of Secretary General until May 1999, after this case began. At the pretrial hearing, the United States submitted a certification signed on February 24, 1999 by Paz's predecessor, Ildefonso Paredes, a nonlawyer, who merely verified that the copies of the Honduran regulations involved in this case conformed to the originals. *See* Gov't Exhibit 1.

unique facts. But petitioners argue that the appropriate degree of deference should at least be substantial deference akin to *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984), while the United States explicitly disputes this and argues (Opp. 18 & n.10) that the proper deference is the vague, lower "totality of circumstances" level akin to *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). This is an important issue worthy of *certiorari*. *See United States v. Mead Corp.*, 533 U.S. 218, 221, 226-27 (2001) (Court grants *certiorari* to address whether U.S. Customs Service tariff classification ruling is entitled to *Chevron* or *Skidmore* deference); *United States v. Haggar Apparel Co.*, 526 U.S. 380, 383 (1999) (Court grants *certiorari* to address whether U.S. Customs Service regulations relating to customs classification of certain imported goods issued pursuant to notice-and-comment rulemaking are subject to the analysis required by *Chevron*).

The panel majority did not afford *any* deference to Honduras' authoritative interpretation of the validity or application of its own laws. First, the majority found that Honduras allegedly made a "postconviction shift" of its position.[4] Citing illegitimate "finality" concerns and rank speculation about foreign governments being improperly pressured to change their laws, the majority held that it was not "bound by the Honduran government's current position." Pet. App. 20a.

In contrast to the panel majority's disregard of Honduras' official position, the majority of the circuits

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[4] As petitioners argued, and as the Honduran government and the dissent made clear, there never was a "shift" in the official position of the Honduran government; it has been consistent throughout this case. Br. for Honduras at 15.

appear to afford at least *Chevron* deference, *e.g.*, *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (per curiam), or even categorical deference. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1474 (9th Cir. 1992). The United States' argument that the appropriate degree of deference is akin to *Skidmore* deference lacks merit;[5] but even if correct, that merely underscores the need for this Court to provide guidance to the lower courts over this recurring and important issue.

This case squarely presents the issue and demonstrates its importance. If *Chevron* deference is appropriate, then federal courts must defer to a foreign country's official interpretation of its laws as long as the

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[5] In *Access Telecom v. MCI Telecommunications Corp.*, 197 F.3d 694, 714 (5th Cir. 1999), for example, the court refused to afford deference not because the court found the interpretation inconsistent over time or generally unpersuasive, but because it found that the agency asserting the interpretation was not authorized to do so. Here, in contrast, the panel majority accurately identified "the Honduran government's current position" on the meaning of Honduran law, but simply asserted that the majority was not "bound" to that undisputed authoritative view. Further, the United States erroneously asserts (Opp. 23-24) that *dicta* in *Jota v. Texaco*, 157 F.3d 153, 160-61 (2d Cir. 1998), supports the panel below, because there "the Second Circuit declined to defer to the Republic of Ecuador's changed view of its own law while a matter was on appeal." This is a gross misstatement of the case. Ecuador initially objected to a lawsuit in the United States on international comity grounds, then later changed its mind and expressed consent under limited circumstances. Thus, the case had nothing to do with Ecuador's "view of its own law." Further, the United States concedes (Opp. 24 n.14) that the court left open the question of how to treat Ecuador's changed position as to the desirability of the lawsuit, because it remanded the case for the lower court to properly apply the international comity analysis. Remanding a case so the lower court may apply the correct law is not "declin[ing] to defer" to Ecuador.

interpretation is "reasonable." *Chevron*, 437 U.S. at 844. Here, Honduras' view that the laws and regulations at issue were invalid at the time of the conduct specified in the indictment is reasonable, as amply demonstrated by Honduras' amicus brief. Indeed, the United States does not claim that the panel majority's decision would survive *Chevron* deference.

For example, with respect to the validity of Resolution 030-95 regarding lobster sizes, the pretrial view of the incumbent Attorney General was confirmed by the post-trial ruling of the Honduran Administrative Court that the defectively issued Resolution was "entirely voided," a nullity, and thus void *ab initio*. *See* Br. for Honduras at 8 and App. 18a-19a. With respect to that part of the Honduran court's ruling stating that it was void for "future inapplicability," the Honduran government gave a reasonable explanation that the statement must be read in the limited context of precluding any future "right to claims" or liability against the Honduran government for damages for past enforcement of the invalid resolution. Br. for Honduras 8 and App. 19a.

By comparison, federal courts are often faced with similar questions of government liability where a challenged law or practice is struck down as unconstitutional, and whether qualified immunity for damages may cover only past acts taken under the infirm law. *See, e.g.*, *Connecticut v. Crotty*, 346 F.3d 84, 93 (2d Cir. 2003). Further, if a federal court strikes down a regulation in an administrative challenge because it was procedurally defective, that is grounds for reversal of a criminal conviction that had been based on a violation of the defective regulation. *United States v. Goodner Bros. Aircraft*, 966 F.2d 380 (8th Cir.

1992).[6]

If, however, this Court were ultimately to adopt the United States' position that only a *Skidmore* level of deference is appropriate, a remand to the lower court to make "the *Skidmore* assessment" would nevertheless be in order. *Mead*, 533 U.S. at 238-39.

CONCLUSION

For the foregoing reasons, as well as those provided by petitioner McNab, the Republic of Honduras (03-622 Pet.), and amici NACDL, *et al.*, the petition for writ of certiorari should be granted.

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[6] Similarly, Regulation 0008-93, which requires, *inter alia*, that seafood be packed in cardboard boxes, was validly issued by the President to enforce Honduras' Law of Industrialization of Meat in 1993. But the Congress repealed the law in January 1995, *before* any of the relevant conduct occurred in this case. Under Honduran law, the repeal of a statute automatically repeals the underlying regulations. Therefore, Regulation 0008-93 "had no legal validity or force during the relevant period of time in this case." Br. for Honduras at 9. This interpretation about the effect of a repeal of Honduran law on regulations is similar to that in the United States. *See, e.g.*, *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1575 (Fed. Cir. 1996) ("When a statute has been repealed, the regulations based on that statute automatically lose their vitality.").

Respectfully submitted,

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JANUARY 13, 2004

Supreme Court, U.S.
FILED
DEC 29 2003
OFFICE OF THE CLERK

(3) (2)

Nos. 03-622 & 03-627

In The
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♦———♦

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v.
UNITED STATES OF AMERICA,
Respondent.

♦———♦

ROBERT D. BLANDFORD, ABNER SCHOENWETTER,
AND DIANE H. HUANG,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

♦———♦

On Petition for Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

♦———♦

BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITIONERS

♦———♦

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BRIEF *AMICI CURIAE* OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, NATIONAL ASSOCIATION OF MANUFACTURERS, AND NATIONAL WILDERNESS INSTITUTE IN SUPPORT OF PETITIONERS

♦———♦

INTEREST OF AMICI

The National Association of Criminal Defense Lawyers ("NACDL") is the preeminent bar organization advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime. Founded in 1958, NACDL has more than 10,000 lawyer members and 80 state and local affiliate organizations with 28,000 lawyer

members committed to preserving the Bill of Rights. The American Bar Association recognizes NACDL as an affiliate organization in its House of Delegates. NACDL promotes study and research in the field of criminal law. NACDL has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice. In furtherance of its objectives over the past decade, NACDL frequently files *amicus* briefs with this Court on various criminal justice issues. *See* NACDL's website at www.nacdl.org.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all 50 states. The approximately 600,000 members of NFIB own a wide variety of America's independent businesses from restaurants to manufacturing firms to bowling alleys.

The NFIB Legal Foundation is concerned about the effect of the increasing number of regulatory crimes on small business. Small businesses, like the Petitioners, are required to comply with a myriad of Federal and State regulations. Not surprisingly, many well-meaning, small-business owners are unaware of all of their legal obligations. Because failure to observe a regulatory obligation often carries a criminal penalty, this reality is particularly troubling. Even more disturbing are cases, such as this one, in which small business owners are convicted for regulatory crimes absent specific intent, and based upon the application of uncertain foreign law.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Members of NAM are subject to the increased use

of criminal penalties in the regulatory state and to the uncertainty that attends the obligation to comply with laws and regulations of multiple (domestic and foreign) jurisdictions whose own construction of those laws is often ambiguous.

National Wilderness Institute ("NWI") is a private, non-profit conservation organization best known for its authoritative studies of wildlife conservation programs. Although NWI publications cover all environmental issues, endangered species conservation has been a particular focus of the organization. NWI studies have revealed shortcomings in current wildlife programs that often limit their effectiveness and waste conservation funds.

Since its founding in 1989, NWI has advocated new approaches to environmental problems including the use of market incentives and technological advancements as a way to improve the environment. These views sometime set it apart from other environmental groups. The American Conservation Ethic, available at the web site www.nwi.org, sets forth NWI's general principles.[1]

SUMMARY OF ARGUMENT

Review in these cases is warranted.[2] Petitioners' eight-year sentences for the effectively *scienter*-less regulatory offense of importing lobster tails in violation of non-existent Honduran law should be reversed.[3]

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[1] Counsel for the parties have consented to the filing of this *amicus* brief; the letters are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that this brief was not prepared, written, funded or produced by any person or entity other than *amici* or their counsel.

[2] Petitioner McNab (No. 03-622) and Petitioners Blandford, Schoenwetter, and Huang (No. 03-627) have filed separate petitions. The United States has chosen to file a consolidated response and this *amicus* brief is directed to the issue presented in both petitions – the applicability of foreign law to domestic regulatory conduct.

[3] Petitioners McNab, Blandford and Schoenwetter were each

The convictions and sentences result from the confluence of two events – the expansion of the reach of the Commerce Clause powers of the Federal government and this Court's determination in *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57 (1910) that the State may "eliminate the question of intent" from any criminal provision without violating the Due Process clause of the Fourteenth Amendment. These developments have led, inevitably, to the complete erosion of the *mens rea* requirement and the expansion of the concept of "public welfare offense." Today, in effect, one who acts in any business or social capacity (as Petitioners did) is subject to what Justice Stewart characterized as a form of "absolute liability." *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558, 569 (1971) (Stewart, J., dissenting).

These Petitions emphasize the importance of these two doctrinal developments and demonstrate the potentially pernicious applications of these doctrines to regulatory matters involving the application of foreign law. The reconfiguration of criminal law through a concerted, long-term crusade to dilute traditional criminal intent requirements allows the government to engage in grotesque over-charging such as that demonstrated here – pyramiding trivial civil infractions of uncertain (and now disavowed) foreign law into smuggling and money laundering offenses that carry astronomical and unjust domestic criminal penalties.

No reasonable observer can doubt that the scope of substantive criminal law has expanded enormously. Today it is called into the service of an extraordinary range of purposes. Beyond its original function of minimizing violent behavior threatening to lives and property, criminal law is now also used to regulate economic enterprise, protect the environment, correct relations among races and genders, and alter habits of consumption of liquor, drugs, and sex. *See, e.g.*, R. Pound, Criminal Justice in America 23 (1930).

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sentenced to 97-month terms of imprisonment. Petitioner Huang was sentenced to a two-year term of imprisonment.

As the Court has long noted, the origin of the public welfare doctrine lay in the belief that "public welfare" offenses typically involve only modest penalties. *E.g. Morissette v. United States*, 342 U.S. 256, 256 (1952) ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). For this reason, the Court has often approached (but never adopted) a rule of construction that would delimit the "public welfare" doctrine and attendant reductions in the *mens rea* requirement to those cases where a "harsh penalty" is not imposed. *See Staples v. United States*, 511 U.S. 600, 616 (1994).

There can now be little doubt that the fundamental premise of this Court's "public welfare" jurisprudence – the presumed modest nature of the criminal penalties attending such offenses – is, as this case painfully demonstrates, false to fact. The foundations of the doctrine have been undermined and review of the doctrine's unwarranted application to Petitioners -- whose alleged violation of a now-disavowed foreign civil law is the sole basis for prosecution -- is therefore appropriate.

ARGUMENT

This Court's plenary review is warranted because the decision of the Eleventh Circuit improperly expands and misapplies the concept of "public welfare offense" to a case involving regulatory "crimes" that have severe domestic penalties despite involving violations only of foreign law that would, if prosecuted in that foreign country be, at most, trivial civil infractions. The issue presented – the interpretation of foreign law and its criminal application to American businesses engaged in an increasingly global economy -- is one of surpassing importance inasmuch as the growth of the American regulatory state has rendered the criminal law applicable to virtually all domestic (and now foreign) productive social and economic conduct.

I. The Question Presented Involves An Issue of Public Importance And Wide Application.

As the scope of the criminal law has expanded, the trend has been to criminalize conduct even where the alleged criminal has acted with diminished, or non-existent intent. While this Court has often noted the fundamental importance of the concept of *mens rea* in our criminal law, the actual treatment of that concept has been reduced to one of statutory interpretation. Not since the early part of the last century has the Court considered whether there are constitutional dimensions to that concept; and its treatment of *mens rea* in that era was, in the words of one noted scholar of criminal law, "flimsy. . .dictum." That dictum has since became a doctrine of "constitutional law that severe criminal punishment may be inflicted at the legislature's will, regardless of whether the defendant had any opportunity to conform his conduct to the requirements of law." H. Packer, "Mens Rea and the Supreme Court," 1962 Supreme Court Review 107, 116.

But that flimsy dictum now has widespread effect. That effect can be felt in all domestic economic and social activity and, as these Petitions demonstrate, now portends palpable effects on those engaged in foreign trade. It would be easy to think that the question presented in these Petitions is of little practical importance – easy, but wrong. The reality is that "public welfare" crimes are a growth industry.

1. Estimates of the current size of the body of federal regulatory criminal law vary. The American Bar Association reported in 1998 that there were in excess of 3,300 separate federal criminal offenses. *See* American Bar Association, *The Federalization of Criminal Law* (1998), Appendix C; *see also* Ronald L. Gainer, "Federal Criminal Code Reform: Past and Future," 2 Buff. Crim. L. Rev. 46, 53 (1998). More than 40 percent of these laws have been enacted in just the past 30 years, as part of the growth of the regulatory state. *See Federalization of Criminal Law* at 9 & 11 (Chart 2). These laws are scattered in over 50 titles of the United States Code,

encompassing roughly 27,000 pages, *see* Gainer, *Federal Criminal Code* at 53, rendering them effectively unknowable.

Worse, the statutory code sections often incorporate by reference the provisions and sanctions of administrative regulations promulgated by various agencies under congressional authorization. Estimates of how many such regulations exist are even less well settled, but the ABA thinks there are "[n]early 10,000." *Federalization of Criminal Law* at 10.

And the growth in the scope of criminal law is, if it is possible, exacerbated by statutes such as the Lacey Act, which criminalize violations of foreign laws (and, arguably, foreign regulations). In this age of globalization, even small and mid-size businesses are likely to engage in both domestic and foreign operations. It simply beggars the imagination to envision how a conscientious businessman might inform himself of the laws (and regulations!) of more than 190 nations. Yet, the construction given the Lacey Act in this case requires such an effort, criminalizes the failure to do so, and, through the magic of money laundering statutes, imposes a cruel and severe eight-year penalty on those who, in the prosecutor's discretion, are deemed worthy of punishment.

2. Nor is the growth in the number of federal criminal statutes merely an academic question, without real world effects. Another measure of the extent to which criminal enforcement of regulatory prohibitions has grown is the resources that have been devoted to the effort. In 2002 (the latest year for which data is available), for example, the Fish and Wildlife Service had 772 sworn law enforcement officers; the Forest Service another 658; Bureau of Land Management – 235; Environmental Protection Agency – 220; Food and Drug Administration – 162; and the National Marine Fisheries Service (whose prosecution is directly at issue in this case) employed 137 law enforcement officers. *See* Bureau of Justice Statistics, *Federal Law Enforcement Officers, 2002* (http://www.ojp.usdoj.gov/bjs/pub/pdf/fleo02.pdf). There can

be little doubt that the Federal government expects results from its investment of these resources.

And those results are evident. Between March 2001 and March 2002 (again, the latest year for which data are available), federal prosecutors commenced 62,957 cases, involving 83,809 individual defendants. *See* Administrative Office of United States Courts, "Federal Judicial Caseload Statistics," Table D-2 (http://www.uscourts.gov/caseload2002/contents.html). More than 3,100 of these defendants were charged with crimes categorized as violations of "federal statutes" -- a category broadly (though not precisely) congruent with charges reflecting violations of a regulatory program. *Id.* This number exceeds the number of federal prosecutions during the same year for a host of common law offense categories, including murder, robbery, embezzlement, forgery, and sex offenses. Put another way, more federal prosecutorial resources are invested in regulatory prosecutions than in the prosecution of forgery charges. *Id.*

And even these statistics understate the impact of the specter of criminal regulatory enforcement. Offenses involving productive economic and social conduct are uniquely subject to risks of over-deterrence. Unlike common law crimes, for which motivations of passion or circumstance often overcome calculation, the world of economic and social conduct is especially responsive to the *in terrorem* effect of criminal sanctions. As a consequence, the mere threat of criminal penalties becomes a tool in the arsenal of civil regulators to coerce compliance with otherwise ill-justified regulatory regimes. For example, one NFIB member, a home health-care provider, recently was compelled to settle with the local prosecutor, who threatened the company with criminal proceedings, fines, and jail. The company reported the Medicaid fraud of one of its employees, whom it fired. In terms redolent of a gangster novel, the prosecutor's office attempted to extract a six-figure fine from this company *before* any criminal charges were filed. This small, respectable business with a clean healthcare claims record settled simply "to make

the case go away," fearing local reprisals and negative publicity.

To be sure, many of these effects are solely domestic. But the foreign law interpretation question at the core of the instant Petitions is a natural outgrowth of these developments. Because social and economic conduct is, as we next demonstrate, subject to an unusual form of near-absolute liability, the structure of laws has the inevitable and essentially *unmeasurable* effect of causing social and economic actors to forego productive, beneficial conduct rather than risk the capricious exercise of prosecutorial discretion. Put more directly, Petitioners' case cannot possibly have been calibrated to achieve an appropriate level of societal deterrence.

Plainly, the importation of food into the United States is a socially beneficial activity – it feeds American citizens. Yet the inevitable effect of the excessive eight-year sentences rendered can only be the over-deterrence of this conduct. Costs will rise; fewer imports will enter the United States; and, in the end, Americans will have fewer gastronomic choices. One rather doubts the utility of this or that Congress intended such a result.

3. The facts of this case readily demonstrate how a simple public welfare offense, involving only modest penalties, can be transmuted through prosecutorial discretionary decision-making into a harsh felony prosecution. Underlying Petitioners' "crime" was a relatively straightforward civil violation of Honduran law (assuming, that is, that Honduran law had any legal application at all). That Honduran civil law in turn became the predicate for a mere *misdemeanor* violation of the Lacey Act, prohibiting the importation of "fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law," 16 U.S.C. § 3372(a)(2)(A).[4] Yet Petitioners' simple regulatory

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[4] Petitioners Blandford and Huang were convicted of both misdemeanor and felony Lacey Act violations. For the misdemeanor convictions, the jury was instructed that they could be convicted if they knew or "should have known" of the underlying foreign law and regulations. Moreover, the jury instruction with respect to the felony

offenses somehow mutated into a criminal matter of near cataclysmic proportions.

Thus, though the bulk of the shipment of "illegal lobster tails" originally seized was not, in fact, "illegal" (save in the sense that they were packaged incorrectly) Petitioners' regulatory violation was creatively used as the predicate for a felony smuggling charge (a general intent crime) alleging the importation of goods into the United States "contrary to law." *See* 18 U.S.C. § 545. This smuggling charge, in turn, became the predicate for money laundering charges, *see* 18 U.S.C. § 1956(a), where the "money laundering" in question was nothing more than the normal commercial transaction of importing, paying for, and depositing the proceeds from the sale of the seafood in question in a bank account. *Cf. United States v. Scialabba*, 282 F.3d 475, 476 (7th Cir. 2002) (expressing doubt that Congress intended to criminalize use of funds that do not entail financial transactions "to hide or invest profits in order to evade detection, the normal understanding of money laundering"). As a consequence, Petitioner McNab is now serving a draconian sentence of 97 months imprisonment. Petitioners Blandford and Schoenwetter were sentenced to the same staggering prison terms, while Petitioner Huang was incarcerated for only two years. All for violating a foreign law and foreign regulations whose existence may not have been known to the defendants and whose construction is the subject of substantial doubt.

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charges against defendants required only that they be shown to have known that they violated foreign law – not any specific statutory or regulatory provision.

II. The Absence Of *Mens Rea* Requirements In Public Welfare Offenses Demands Certainty In The Determination of Foreign Law By Foreign Governments.

There would be relatively little difficulty with uncertainty in the determination of foreign law if actual knowledge of foreign laws were an element of federal offenses alleging their violation. As we next demonstrate, however, the Federal government has made a concerted effort to drain all regulatory criminal law of any intent requirement – an effort that demands a concomitant certainty in the determination of foreign law.

1. The requirement that a crime involve culpable purposeful intent has a solid historical grounding. As Justice Robert Jackson wrote:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will."

Morissette, 342 U.S. at 250-51. Thus, the very earliest English common law recognized that one who intended to commit an act (say injuring a horse) and who mistakenly committed a different crime (killing the horse) could not be said to have intended the graver crime of intentionally killing the animal. *See Dobbs Case*, 2 East P.C. 513 (1770); *see also Thacker v.*

Commonwealth, 134 Va. 767, 114 S.E. 504 (1922) (defendant shot at a light and struck and killed a victim; not guilty of murder); *State v. Peery*, 224 Minn. 346, 28 N.W.2d. 851 (1947) (requiring proof of "intent to be lewd" in indecent exposure prosecution of defendant who was accidentally viewed through ground floor window by passers-by).

But this conception of intent (or what the Model Penal Code drafters called "purpose") -- that is, a conception necessitating proof that a defendant intended both to do the act which constituted the offense and to accomplish the particular harm prohibited -- did not long survive even in the common law. English and American courts have now come to the view that in most legal contexts a criminal actor who intends to engage in an act is liable for whatever harm eventuates, even if it is different from that which was within his original contemplation. *E.g. State v. Wickstrom*, 405 N.W.2d 1 (Ct. App. Minn. 1987) (defendant hit victim causing abortion of pregnancy; guilty of criminal abortion despite lacking intent to injure fetus). In the words of the Model Penal Code one can act "knowingly" or with the general intent to do the acts which constitute the offense without regard to any specific intent to do a wrongful act or violate a law. *E.g. People v. Garland*, 254 Ill.App.3d 827, 627 N.E.2d 377, 380-81 (1993) ("Specific intent exists where from the circumstances the offender must have subjectively desired the prohibited result. General intent exists when the prohibited result may reasonably be expected to follow from the offender's voluntary act even without any specific intent by the offender.").

2. This development has perverse consequences in the context of the rise of the "regulatory state" and the resulting growth in the cluster of problems involving the relationship of the criminal law to the conduct of economic enterprise. In the context of regulatory offenses the concept of intent has diminished, departing from its traditional understanding.

Building on the time-honored maxim that "ignorance of the law is no excuse," for example, courts now routinely conclude that one can be convicted of a crime for having acted knowingly

(that is purposefully doing an act) without the additional requirement that the government prove that the defendant had a conscious desire to achieve a particular end or to violate a known legal duty (typically one found in the form of a statutory or regulatory prohibition). Thus violations of the Sherman Antitrust Act require only proof of deliberate business conduct without proof of intent to monopolize or intent to violate the law. *E.g. United States v. United States Gypsum Co.*, 438 U.S. 422, 445–46 (1978).[5]

This description of the *mens rea* requirements that have developed in the regulatory context is deeply troubling. It makes clear the extent to which actors in a highly regulated industry are subject to criminal liability for their unknowing acts. Though the law often requires that they have acted "knowingly" -- a seeming protection from the imposition of strict liability -- that requirement is but a parchment barrier to what is, in effect, the imposition of absolute liability. Proof that one in fact lacked knowledge of the regulatory requirement at issue is, uniformly, no defense to the prosecution. *E.g. International Minerals & Chemical Corp.*, 402 U.S. at 565 ("[W]here * * * dangerous or deleterious materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.").

A common example illustrates the point: Consider, the crime of "knowingly filing a false monitoring report" under the Clean Water Act. *See* 33 U.S.C. § 1319(c)(4) (making it a crime to knowingly make a false statement in any certification required by the regulations promulgated by Environmental

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[5] Notably, in this example, a corporate executive will at least know that his company's market share is increasing, alerting him to circumstances that might warrant inquiry. In complex health, safety and environmental regulatory regimes there is often nothing extrinsic that will alert the average businessman to the proscribed nature of this conduct. Similarly, in today's global marketplace there is often no indication of a potential violation of foreign laws or regulations.

Protection Agency), *and* 40 C.F.R. § 122.41(*l*)(4) (requiring compliance with permit requirements, which require the filing of a "discharge monitoring report").[6] The law that defines what is false or misleading is part of a large regulatory scheme that also includes a regulatorily-imposed obligation on each individual to insure the accuracy of any reports made. As a consequence, the only showing the government must make to the satisfaction of a jury is that the defendant has "knowingly filed" the report, irrespective of whether or not he actually knew it was false. And since nobody files a report without doing so intentionally (reports do not get signed, sealed, and mailed by accident or mistake), the only showing necessary is the trivial showing that the defendant has purposefully put a letter in the mail. As Justice Potter Stewart noted: "As a practical matter, therefore, they are under a species of absolute liability for violation of the regulations despite the 'knowingly' requirement." *International Minerals & Chemical Corp.*, 402 U.S. at 569 (Stewart, J., dissenting).

Petitioners' case illustrates the point (and the dangers) readily. The underlying premise for the indictment and convictions is that Petitioners violated the Lacey Act by importing and selling lobster tails that allegedly were in violation of three Honduran laws, resolutions, and regulations. Yet, for more than six months the federal government was unable to discern what, if any, Honduran regulations had been violated. That uncertainty was no barrier to prosecution -- the Lacey Act, (like other regulatory criminal laws), does not require the Government to demonstrate that Petitioners had actual knowledge of those Honduran laws. Nor is it an element of the offense to prove that they had more generalized knowledge of the prohibitions of the Lacey Act. Indeed, for a misdemeanor violation the "should have known" standard suffices.

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[6] As this brief exegesis demonstrates, even discerning that the law criminalizes the filing of a false report is, itself a problematic endeavor.

Thus, all that is required is a showing that a defendant was aware of the nature of his or her conduct -- a showing that is trivial in the regulatory context as no economic actor routinely engages in business conduct by accident or without knowledge of the nature of his conduct. Rather he acts (as here by importing goods) with a purpose and, under current legal doctrine that purposeful act puts him on notice as to the entire panoply of attendant laws and regulations – a panoply that, under the Lacey Act, includes the laws and regulations of *every* foreign country. Moreover, this rule of law applies *even if* (as here) the construction and interpretation of those laws is indefinite and subject to dispute even by the sovereign who has adopted them. Contemporary regulatory criminal law thus dispenses with any pretence that it criminalizes the conduct only of those who have a wrongful intent.

3. What is particularly disturbing about the trend toward diminished intent requirements is that it is exacerbated by a trend toward significantly harsher penalties. Historically, when the courts first considered regulatory laws containing reduced intent requirements, the laws uniformly provided for very light penalties such as a fine or a short jail term, not imprisonment in a penitentiary. *See Staples*, 511 U.S. at 616 (citing *e.g. Commonwealth v. Raymond*, 97 Mass. 567 (1867) (fine up to $200 or 6 months in jail); *Commonwealth v. Farren*, 91 Mass. 489 (1864) (fine only); *People v. Snowburger*, 113 Mich. 86, 71 N.W. 497 (1897) (fine up to $500 or incarceration in county jail)).

As early commentators noted, modest penalties are a logical complement to crimes that do not require specific intent. *See* Francis B. Sayre, "Public Welfare Offenses," 33 Colum. L. Rev. 55, 70 (1933); *see also Morissette*, 342 U.S. at 256 ("penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"). Indeed, initially some courts questioned whether any imprisonment at all could be imposed in the absence of intent and culpability. *E.g. People ex rel. Price v. Sheffield Farms-Slawson-Decker, Co.*, 225 N.Y. 25, 32–33, 121 N.E. 474, 477 (1918) (Cardozo, J.);

id. at 35, 121 N.E. at 478 (Crane, J., concurring) (imprisonment for crime that requires no *mens rea* stretches law of regulatory offenses beyond its limitations). But this historical view has now been lost. Regulatory laws with reduced *mens rea* requirements are often now felonies. *E.g. United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (felony violation of Clean Water Act—no knowledge of regulations necessary).[7]

And, through the pyramiding of serious felonies on top of minor regulatory offenses, even modest crimes can be "enhanced" into significant terms of imprisonment. For example, in Fiscal Year 2001, the average term of imprisonment for Environmental and Wildlife offenses in the Eleventh Circuit was only 9.6 months. *See* United States Sentencing Commission, Federal Sentencing Statistics By State, District & Circuit, Table 7 ("Average Length of Imprisonment By Primary Offense Category") (2001) (http://www.ussc.gov/judpack/2001/11c01.pdf). The contrast between this modest penalty and the 97-month sentence that three of the Petitioners received for their own "wildlife" offense is self-evident.

4. As Justice Thomas recently wrote in a different domestic regulatory context (involving construction workers), the broad view of the appropriate scope of criminal law adopted by the Eleventh Circuit in this case "expose[s] countless numbers of . . . workers to heightened criminal liability for using ordinary devices to engage in normal industrial operations." *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of certiorari). Supreme Court precedent, has

> never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to

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[7] And even misdemeanor offenses can, through the stacking of sentences, result in substantial terms of incarceration *E.g. United States v. Ming Hong*, 242 F.3d 528 (4th Cir. 2001) (misdemeanor convictions stacked for 3 year sentence).

> extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety.

Id. So, too, presumably, with lobster importers, or sewage treatment workers, or automobile manufacturers, accountants, bartenders, garbage collectors, sports referees, or even (dare we say) lawyers.

In short, historical changes in the *mens rea* requirements have been substantial. The criminal law today is far different from the criminal law of 100 years ago. For regulatory crimes there is, in effect, a standard of near-absolute liability. This interpretation of regulatory statutes with increasingly onerous criminal penalties has lost sight of a fundamental truth: "If we use prison to achieve social goals regardless of the moral innocence of those we incarcerate, then imprisonment loses its moral opprobrium and our criminal law becomes morally arbitrary." *Weitzenhoff,* 35 F.3d at 1293 (Kleinfeld, J., dissenting from denial of rehearing *en banc*).

Put another way, given the comprehensive nature of regulation in America society today, the growth of the public welfare doctrine has, in effect, led to the abandonment of any intent requirement for virtually the entire range of commercial, social, and economic activity in the marketplace. This situation is fundamentally wrong. For as the drafters of the Model Penal Code said:

> It has been argued, and the argument undoubtedly will be repeated, that strict liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement precludes litigation of the culpability of alleged deviation from legal requirements, the enforcers cannot rightly demand the use of penal sanctions for the purpose. Crime does and

> should mean condemnation, and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised.

American Law Institute, Model Penal Code § 2.05 and Comments at 282–83 (1985).

This case is a paradigmatic example of how these expansive doctrines of liability can be misapplied to a context in which the scope of the underlying laws are uncertain, at best. Petitioners' manifestly unjust eight-year sentences for the importation of lobster tails -- without knowledge of the underlying Honduran regulations and without clarity in Honduran law on the construction of those regulations -- call out for correction.

The criminal law has moral foundations. At some point a limit on the ability of a legislature to criminalize social conduct must exist. We submit that these Petitions have reached that point: When the judicial system punishes with extraordinary sanctions conduct that lacks any criminal intent and that violates a foreign law, which the foreign government itself now disclaims, review is appropriate.

Had the Eleventh Circuit appropriately deferred to the considered position of the government of Honduras there would have been no scope for the application of the pernicious doctrines we have identified. The existence of these expansive doctrines of criminal liability demands, at a minimum, judicial deference to the foreign law determinations of a foreign government.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

December 2003

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